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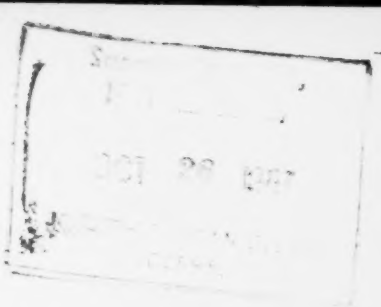

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1987

GARY RAWSON,
Petitioner,

v.

SEARS, ROEBUCK AND COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. A split panel of the Federal Appeals Court cannot abolish a citizen's common-law right to redress for injury, which is guaranteed to him by the Colorado Constitution and clear Colorado Supreme Court precedent. The result of this decision is the reversing of the largest discrimination verdict in U. S. history ($15.8 million); the abolition of Colorado common-law and the common-law of the other 37 states with similar constitutional provisions.

2. The split panel's refusal to apply the long standing doctrine of "great deference to the trial judge, unless clearly erroneous" (commonly called "the local judge rule") was error and in conflict with other circuit courts.

3. The Federal Appeals Court asked Mr.

Rawson whether he wanted the case certified to the Colorado Supreme Court but did not tell him that the Court would not be applying the "local judge rule" to his case of first impression. Equity and justice demand that this Court certify the issue to the Colorado Supreme Court.

(b) PARTIES TO PROCEEDINGS BELOW

The only parties to this proceeding in the court below are those indicated by the caption of this case.

(c) TABLE OF CONTENTS

APPENDIX - PART II

TABLE OF AUTHORITIES

CASES

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1987

GARY RAWSON,
Petitioner,

v.

SEARS, ROEBUCK AND COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

The petitioner, Gary Rawson, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Tenth Circuit.

(d) OPINIONS BELOW

The opinions of the United States District Court for the District of

Colorado (Kane, John) have been reported at 530 F.Supp. 776, 554 F.Supp. 327; 585 F.Supp. 1393; 615 F.Supp. 1546. These opinions are reprinted in the Appendix Part II, pp. 108a-209a.

The opinion of the United States Court of Appeals for the Tenth Circuit reversing and remanding with instructions to the District Court is reported at 822 F.2d 908 and is reprinted in the Appendix, pp. 1a-69a. It includes a detailed dissent by Judge McKay, 822 F.2d at 922-928, and is reprinted in Appendix, pp. 70a-101a. The Court's order denying Mr. Rawson's Petition for Rehearing and Suggestion for Rehearing En Banc is reprinted in the Appendix, pp. 102a-103a and the District Court Order dismissing the commplaint is included in Appendix,, Part II, p. 210a.

(e) JURISDICTION

(i) The jurisdiction of the District Court was invoked under 28 U.S.C. section 1332 because of diversity of citizenship, Rawson being a citizen of Colorado, and Sears being a New York corporation.

(ii) The date of opinion and order of the United States Court of Appeals for the Tenth Circuit, which determined Gary Rawson did not have a cause of action for age discrimination in Colorado and remanded the case to District Court was June 10, 1987. The order denying Rawson's Petition for Rehearing and Suggestion for Rehearing En Banc was entered by the Court of Appeals on July 28, 1987.

(iii) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254 (1).

f. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF COLORADO

ARTICLE II Section 6. Equality of justice. Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.

ARTICLE VI Section 9. District courts - jurisdiction. (1) The district courts shall be trial courts of record with general- jurisdiction, and shall have original jurisdiction in all civil, probate, and criminal cases, except as otherwise provided herein, and shall have such appellate jurisdiction as may be prescribed by law.

Colorado Revised Statutes

8-2-116. Age of employeee not ground for discharge. No person, firm, association, or corporation conducting within this state any business requiring the employment of labor shall discharge any individual between the ages of eighteen and sixty years, solely and only upon the ground of age,, if such individual is well versed in the line of business carried on by such person, firm, association, or corporation and is qualified physicaly, mentally, and by training and experience to satisfactorily perform and does satisfactorily perform the labor assigned to him, or for which he applies.

8-2-117. Penalty for violation. Any person, firm, association, or corporation, or officer, agent, or

representative of such corporation who violates, or permits to be violated, any of the provisions of section 8-2-116, upon conviction thereof, shall be fined not less than one hundred dollars nor more than two hundred fifty dollars for each violation.

8-3-108. What are unfair labor practices. (1) It is an unfair labor practice for an employer, individually or in concert with others to:

(1) Commit any crime or misdemeanor in connection with any controversy as to employment relations;

8-3-121. Civil liability for damages. (1) Any person who suffers injury because of an unfair labor practice has a right of action, jointly and severally, against all persons participating in said practice for

damages caused to the injured person thereby.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RULES OF THE COURT

36.3. Citation of Unpublished Opinions/Orders and Judgments.

Unpublished opinions and orders and judgments have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel.

The following constitutional provisions and statutes are set forth in the Appendix Part II: the Fifth, Tenth and Fourteenth Amendment to the United States Constitution; 28 U.S.C. section 1254 (1); Colorado Appellate Rule 21.1.

STATEMENT OF THE CASE

INTRODUCTION

This was the largest discrimination verdict in U.S. history, $15.8 million ($24 million with interest). Sears had been found guilty and punished by two separate federal juries for the cruel firing of Gary Rawson. It was age discrimination and more.

In March 1979, Sears fired 59 year old Gary Rawson after 33 years of exemplary service, the last 14 of which he was manager of Sears' Pueblo, Colorado store. (203a) Mr. Rawson "was discharged in a callous and demeaning manner. . .the method of investigation and termination was insulting and utterly disregarded plaintiff's rights and feelings. (203a) Mr. Rawson was discharged in pursuit of a company-wide plan to reduce the number of

older employees in order to make room for promotions of younger employees. Sears reaped large financial gains from employee cutbacks. (203a-204a) Mr. Rawson's reputation in his community was destroyed by the acts of Sears. He was totally disgraced to the extent that he contemplated suicide." (206a)

In an awesome display of corporate greed, arrogance, and insensitivity, Sears proudly announced in open court, we did it to him, and we'd do it again in the same way.

Nearly destroyed by Sears, Mr. Rawson fought valiantly to restore his dignity. At the time of Mr. Rawson's firing, Colorado had an unequivocally declared public policy against firings based solely on age, C.R.S. 8-2-116 (p.11) Because of this fact, and that Mr. Rawson

had no remedy, Judge Kane, sitting as a common-law court (p.10,92a) allowed Mr. Rawson's Colorado Constitutional right to sue. (". . injuries occasioned by a known wrong are compensable. ."). (95a)

In one stroke of the pen, a split panel of the Tenth Circuit, the majority consisting of an appellate judge from Utah, and a district judge from Oklahoma, said Mr. Rawson had no cause of action under Colorado common-law. In so doing, the split panel abolished the common-law in Colorado and in 37 other states which codify the common-law in their state constitutions. As a result, the conclusions of two juries and of the district court judge were eviscerated, a victim of blatant discrimination was left uncompensated, and a wrongdoer was left the victor.

TRIAL COURT PROCEEDINGS

Mr. Rawson filed his complaint in state district court at Pueblo, Colorado July, 1981. Sears removed the case to case to federal court on diversity grounds. 28 U.S.C. sec. 1332 Mr. Rawson filed eleven state claims, ten of which were dismissed by the district court. The court found that Mr. Rawson had properly pleaded a cause of action in claim one: age discrimination under Colorado law. [1] (172a)

In 1986, C.R.S. 8-2-116 was repealed by the Colorado legislature, and age discrimination was placed under Colorado's Civil Rights statutes, which

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1. Under 29 U.S.C. 621-634, 633 (ADEA) states are also allowed to enforce prohibitions against age discrimination, and are thus not pre-empted by the ADEA.

now provide remedies to injured persons similar to the ADEA. (89a) This is the common-law process at its best: in 1903, the legislature declared age discrimination a crime; in 1982, a federal judge, sitting as a state common-law judge, provided a remedy, since there was none; in 1986, the legislature codified and modified both the violation and the remedy. It is the common-law right that is at issue here, not the subsequent repeal of the statute, which requires this Court's review. The issue is not mooted by the repeal of the statute.

Sears asked that the trial be bifurcated on the issues of liability and damages; their motion was granted. (174a)

The parties went to jury trial on the issue of liability and a verdict in Mr.

Rawson's favor was returned on January 30, 1984, finding that Mr. Rawson had been "fired solely and only on the grounds of age." (153a)

On July 19, 1985, a second separate jury awarded Mr. Rawson $857,000.00 in past and future wages and benefits, $5,000,000.00 for pain and suffering, and $10,000,000.00 in exemplary damages. (176a)

Motions for new trial and judgment N.O.V. were denied as to each verdict. (170a, 209a)

APPELLATE COURT PROCEEDINGS

Sears filed a Notice of Appeal and promptly posted a court ordered $24 million bond.

The Appellate panel recognized that it was presented with a case of first impression under Colorado law. (10a) The

Appellate Court then ordered:

> "The parties are to address whether the issue of whether there is a private cause of action under C.R.S. section 8-2-116 should be certified to the Colorado Supreme Court." (104a-106a)

The panel failed, however, to advise or make known in any manner, that they would not be applying the time honored Tenth Circuit and U. S. Supreme Court precedent: ("the local judge rule") - that great deference is given to the trial judge's interpretation of local law, unless clearly erroneous. Assuming that the "local judge rule" would be applied, Mr. Rawson easily decided not to ask for certification. Sears opposed certification. The case was not certified to the Colorado Supreme Court. Briefs were then submitted. Oral agruments were heard on September 8,

1986. On June 10, 1987, a two to one decision was issued holding that Mr. Rawson did not have either an express or an implied right of action under the statute. (25a,57a) The split panel did not address Mr. Rawson's common-law rights and therefore denied the common-law right recognized by the trial court.[2] (99a) The split panel ordered his judgment vacated, and the complaint dismissed. (69a)

In his dissent, Judge McKay admonished the majority's "lawless" rejection of the "local judge rule," (70a) and "...its elaborate avoidance of

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2. Colorado is a "notice pleading" state, thus, it is unnecessary to name the cause of action. A claim is sufficiently pleaded if the facts pleaded give notice of the conduct complained of.

the clearly erroneous rule and its application of a de novo standard." (84a) Judge McKay further stated that "this panel cannot overturn the trial court's interpretation of state law without rendering nugatory the clearly erroneous standard of review--a much greater mischief in the long run than affirming a result in this case with which the majority disagrees as a matter of first impression." (88a) The dissenting opinion further states that..."this plaintiff has been wronged in violation

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2. Continued. . .
Since the trial court found Mr. Rawson had pleaded a sufficient cause of action, and Mr. Rawson prevailed on this cause of action, the verdict must be upheld under any theory, i.e. express, implied, common-law, or any recognized cause of action. Regardless of the trial court's label for the cause of action, implicit in his ruling is the recognition of Mr. Rawson's common-law right.

of both general and legislatively declared public policy. The application of ancient and well respected rules of decision mandates that its judgment and that of its fact-finding common-law jury be affirmed." (99a)

The Plaintiff's request for a re-hearing with a suggestion of en banc was denied on July 28, 1987. (102a)

ARGUMENT

Article II, section 6 of the Colorado Constitution (p. 10) is any citizen's ticket into the courthouse for a recognized wrong:

> Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.

In Colorado both the legislature and the judiciary are empowered to make law.

This (Art. II, sec. 6) "and similar constitutional provisions are mandates to the judiciary rather than to legislatures." Goldberg v. Musim 162 Colo. 461, 427 P.2d. 698, 702 (1967)

The Supreme Court of Colorado construing this section has declared:

> For any act of another which constitutes an injurious invasion of any right of the individual which is recognized by or founded upon any applicable principle of law, statutory or common, the courts shall be open to him and he shall have remedy, by due court of law. Goldberg, supra

> When a duty has been breached producing a legal claim for damages, such claimant cannot be denied the benefit of his claim for the absence of a remedy. Vogts v. Guerrette, 142 Colo. 527, 351 P.2d 851, 854 (1960);

The Tenth Circuit also agrees that "the common-law still obtains in Colorado". Hackbart v. Cincinnati Bengals, 601 F.2d 516, 523 (10th Cir.,

1979)

So clear was this mandate that Judge Kane had no choice but to let Mr. Rawson proceed because of his injury in violation of C.R.S. 8-2-116.

The Tenth Circuit may not eliminate Mr. Rawson's common-law rights.

While it is rare for a district judge to exercise his power to create new rights at common-law, the Colorado Supreme Court, with the very same powers as District Judge John Kane, has not hesitated to create new rights and remedies. In fact, the Colorado Supreme Court in the last fifteen years alone, has recognized six new causes of action under common-law. The most recent is Travelers Ins. Co. v. Savio, 706 P.2d,1258 (Colo. 1985) (recognizing the new tort of "bad faith by an insurer").

As Judge McKay so ably asserts: [A common-law court's] further task, which is grounded in conservative doctrine antedating the founding of the State of Colorado and even the nation, is to expand and contract causes of action, particularly those sounding essentially in tort, as wisdom and experience dictate. That function is, indeed, the majesty of the common law." (92a,93a)

WHY CERTIORARI SHOULD BE GRANTED

This court should grant certiorari:

I

Because a federal appeals court may not abolish the Colorado common-law. Thirty-seven states have similar constitutional provisions guaranteeing access to the court for known wrongs. The citizens of these states need to know whether such constitutional provisions

give them enforceable rights. Such an abolition of a state constitutionally guaranteed right is a denial of Mr. Rawson's Fifth Amendment, U.S. Constitution, right not to be deprived of property without due process of law. Additionally, the split panel's decision violates the Tenth Amendment, which reserves matters of common-law to the states.

Further, because the split panel decision is clearly in conflict with Colorado Supreme Court law (Vogt and Goldberg, supra.), it violates Mr. Rawson's 14th Amendment right to equal protection of the law.

II

Because the split panel's failure to apply the "local judge rule" is in conflict with the nine other federal

circuit courts, and the U. S. Supreme Court, that do apply this rule. Bishop v. Wood, 426 U.S.341, 346 (1976), and Wren v. New York Life Ins. Co., 493 F.2d.839, 841 (5th Cir. 1974) (70a-88a)

III

Because the split panel has so far departed from the acceptable and usual course of judicial proceedings as to call for an exercise of power of this Court's supervision. It's bad enough for the split panel to deny Mr. Rawson his constitutional right of access to the court, allowed by the trial judge, but to break their own rules to do it, is abhorrent.

The unacceptable judicial proceedings consisted of:

A. Failure and refusal to give the district judge any deference, violating

clearly established precedent in the Tenth Circuit ("local judge rule"). (70a-88a)

B. Knowing that this split panel would not be using this standard of review (great deference to the trial judge unless clearly erroneous), incredibly and cruelly, the panel asked Mr. Rawson whether he wanted the case certified to the Colorado Supreme Court. They never told Mr. Rawson that they wouldn't be giving Judge Kane's decision great deference. (104a) This deprived Mr. Rawson of the ability to make a critical, rational decision. (This is like forgetting to tell your best friend, who asked to borrow your car, that the brakes don't work. Do you think he'd still want to borrow the car?)

C. This case presented Judge Kane

with a critical state law issue of first impression. Despite Judge Kane's detailed analysis and reasoned determination of Colorado law, and despite the opinions of two other federal judges, Judge Carrigan, a former Colorado Supreme Court Justice, and Chief Judge Finesilver confirming Judge Kane's analysis, the majority held that Judge Kane was entitled to no deference whatsoever because of a subsequent one-page, unpublished order[3] issued by a Fourth District court judge. But for

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3. Remarkably, six months before the split panel's decision, authored by Judge Anderson, he had voted with the majority (5-3) in a hotly disputed rule adoption, 36.3, (p.13) prohibiting the citation or use of unpublished opinions by any court within the Tenth Circuit. The cited unpublished case here reversed the entire case, including two jury verdicts and the "local judge rule."

that three-sentence-long order. (107a) Judge Kane's opinion would have been reviewed under the "clearly erroneous" standard that has been enunciated and applied repeatedly by the Tenth Circuit Court. As it is, because of that unpublished order which contained no reasoning,[4] analysis, or even context, an entirely new standard was applied to reverse Judge Kane's detailed analysis and decision.

IV

Because of the enormity of this verdict (nearly $24 million). In our system of justice the size of verdicts and judgments usually reflects the

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4. Weiss v. United States, 787 F.2d 518, 525 (10th Cir., 1986), holding 10th Circuit owes no deference to district court orders which fail to provide any reasoning on state-law matters.

the severity of the injury and the nature of wrongdoers conduct.

V

Alternatively, Mr. Rawson requests that this Court certify this issue to the Colorado Supreme Court.

Since even the majority agrees that it is how the Colorado Supreme Court would decide the issue that is determinative. (29a) Doesn't Mr. Rawson deserve, in the interest of justice, a determination by the state's highest court? The unique circumstances of this case require certification. Although the U. S. Supreme Court normally defers to the Appellate Court's interpretation of state law, it would be inappropriate here because the Appellate Court did not defer to the trial court's interpretation. The law should be applied consistently.

Additionally, the issue of private right is currently before the Colorado Court of Appeals (Boccalatte v. Asamera Oil (U.S.), Inc., Colo. Ct. of Appeals, 87CA0683 and Mr. Rawson should have the benefit of this decision.

CONCLUSION

The split panel's personal distaste for the multi-million dollar verdict awarded to an "insignificant little citizen" against one of America's revered corporations should not constitute a sufficient basis to suspend the application of long standing precedent and clear Colorado law. Such actions amount to unwarranted judicial activism.

THEREFORE, this Court should grant certiorari to review the split panel's decision, or in the alternative, certify the case to the Colorado Supreme Court.

Respectfully submitted,

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Appendix A

822 F.2d.909

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 85-1223, 85-2366

GARY RAWSON,

Plaintiff-Appellee,

v.

SEARS, ROEBUCK & CO.,

Defendant-Appellant.

Decided June 10, 1987
Rehearing Denied July 28, 1987

Appeal from the United States
District Court for the
District of Colorado
C.D.C. No. Civ. 81-K-1454

COURT OF APPEALS OPINION

Before McKAY and ANDERSON, Circuit Judges, and BOHANON, District Judge.*

STEPHEN H. ANDERSON, Circuit Judge.

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* Honorable Luther L. Bohanon, Senior Judge, District of Oklahoma.

Sears, Roebuck & Company appeals from a denial of post trial motions relating to a $19,096,495.01 judgment against it, plus $11,096.54 in costs, in an age discrimination case. The action was brought by Gary Rawson, a former Sears' employee and store manager, whom Sears fired at age 59.

Rawson was employed by Sears for thirty-three years, becoming manager of the Sears store in Pueblo, Colorado, in 1965, where he served until his termination in 1979. Following his

termination he either failed or chose not (the record does not disclose the reason) to pursuehis age discrimination claim under the federal antidiscrimination statute enacted for that purpose, Age Discrimination in Employment Act of 1967, 29 U.S.C. Sections 621-634 (ADEA).

In July, 1981, twenty-eight months after his termination and beyond the statutory period for seeking relief under the ADEA, Rawson sued Sears in the Colorado state courts, stating eleven claims for relief, including several common law causes of action.[1]

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1. Rawson alleged, for example, outrageous conduct, breach of contract, wrongful conduct and promissory estoppel. Rawson has not appealed the dismissal of those claims and the only issue on appeal is the existence of a right of action

All of those claims were ultimately dismissed except his claim based on an implied private right of action under a Colorado penal statute, Colo. Rev. Stat. Sections 8-2-116 and 117 (1973).[2] Those sections impose a fine from $100 to $250 upon employers who discharge employees

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1. Continued . . .
under Colo. Rev. Stat. Sections 8-2-116 and 117 (1973). This is at least a partial answer to the dissent's invitation for us to engage in some wide-ranging search for a common law cause of action to redress the wrong allegedly suffered by Rawson.

2. In his initial complaint, Rawson alleged only a violation of section 8-2-116 and thereby, implicitly, asserted only an implied right of action. On appeal, he vigorously argues that sections 8-2-116 and 117, in conjunction with sections 8-3-108 (1) (1) and 8-3-121(1) of Colorado's Labor Peace Act, Colo. Rev. Stat. Sections 8-3-101 to 123 (1986), provide him with an express right of action as well.

solely because of age.[3] Those provisions had been the law in Colorado for seventy-eight years prior to Rawson's suit without any private action having been brought under them. Shortly after

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3. Section 8-2-116 provides as follows:

> No person, firm, association, or corporation conducting within this state any business requiring the employment of labor shall discharge any individual between the ages of eighteen and sixty years solely and only upon the ground of age, if such individual is well versed in the line of business carried on by such person, firm, association, or corporation and is qualified physically, mentally, and by training and experience to satisfacorily perform and does satisfactorily perform the labor assigned to him or for which he applies.

Section 8-2-117 subjects any person who violates section 8-2-116 to a fine of between $100 and $250.

Rawson's victory in this suit the Colorado legislature repealed the statutes in question, placing a similar provision under the Colorado Antidiscrimination Act (CAA), Colo. Rev. Stat. Sections 24-34-401 to 406 (1982 & Supp. 1986). Thus, this case and a few which followed are the only ones involving the propriety of private suits under those state penal statutes. The Colorado Supreme Court has never ruled on the question, and both parties have resisted certification.[4]

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4. Before the liability phase of the trial in this case, Sears requested that the district court certify the question of the existence of a private right of action to the Colorado Supreme Court. Rawson opposed certification and the district court declined to certify the issue. In this court, both parties have opposed certification.

Sears removed Rawson's suit from state to federal court on grounds of diversity of citizenship. On Sears' subsequent motion to dismiss for failure to state a claim, the district court held that "the Colorado legislature intended to create a private right of action under C.R.S. Section 8-2-116 and that such a right of action is consistent with the state's legislative scheme in labor relations." Rawson v. Sears Roebuck & Co., 530 F. Supp. 776, 778 (D. Colo. 1982). It also denied, in a published opinion, Sears' later motion for summary judgment. Rawson v. Sears Roebuck & Co., 554 F. Supp. 327 (D. Colo. 1983). Separate jury trials were held on the questions of liability and damage, the outcome of both trials being favorable to Rawson. Following the trial

on liability, in a third published opinion, the district court held again that private damage awards were proper under section 8-2-116. Rawson v. Sears Roebuck & Co., 585 F. Supp. 1393 (D. Colo. 1984). It then awarded Rawson costs amounting to $11,096.54. At the conclusion of the damages trial the jury awarded Rawson: $580,500 for lost wages and benefits; $264,410 for future wages and benefits and a reduction in the value of his pension benefits; $5,000,000 for pain, suffering and humiliation; and $10,000,000 in punitive damages. Sears' motions for judgment n.o.v., new trial, or remittitur were denied. 615 F.Supp. 1546. Judgment entered on the jury verdict included prejudgment interest in the amount of $3,251,585.01, for a total judgment of $19,096,495.01.

On appeal Sears asserts multiple assignments of error in the proceedings below. Two threshold issues, which we find dispositive of this appeal, are whether there is an express or an implied private right of action under the Colorado penal statute in question, sections 8-2-116 and 117, either alone or in combination with sections 8-3-108(1)(1) and 8-3-121(1) of Colorado's Labor Peace Act. Because we find that the statutes in question provide Rawson with neither an express right of action nor an implied private right of action, we find it unnecessary to address the other issues raised in this appeal, and we reverse the judgment below.

INTRODUCTION

At the outset we note that our task here is to interpret and apply the law of Colorado as we believe the Colorado Supreme Court would. City of Aurora v. Bechtel Corp., 599 F.2d 382, 386 (10th Cir. 1979); Symons v. Mueller Co., 493 F.2d 972 (10th Cir. 1974). Prior to the district court decision in this case, no Colorado court or federal court applying Colorado law had addressed the particular question of whether a private right of action exists under section 8-2-116 for age discrimination. Since that decision, federal district courts in Colorado and lower Colorado state courts have reached conflicting conclusions on that issue. Compare Spulak v. K-Mart Corp., No. 85-F-2062 (D. Colo. Nov. 21, 1985) (Finesilver, J.); Grandchamp v. United

Air Lines, Inc., 36 Empl. Prac. Dec. (CCH) paragraph 34,987 (D. Colo. Jan. 15, 1985) (Carrigan, J.); and Marks v. Cobe Laboratories, No. 85-CV-2726 (Jefferson Dist. Ct. Colo. Nov. 12, 1985) (all following Rawson and finding that a private right of action exists) with Taylor v. K-Mart Corp.,---F.Supp.---, No. 85-M-2336 (D. Colo. Jan. 13, 1986) (Matsch, J.); Boccalatte v. Asamera Oil (U.S.) Inc., No. 86-CV-6283 (Denver Dist. Ct. Colo. Jan. 11, 1987); Sandro v. ICM Mortgage Corp., No. 86-CV-6 (Arapahoe Dist. Ct. Colo. July 1, 1986) and Laird v. Montgomery Ward, Inc., No. 85-CV-5569 (Denver Dist. Ct. Colo. Apr. 18, 1986) (finding that no private right of action exists).[5]

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5. We note that unreported or unpublished state trial court decisions

In endeavoring to ascertain the proper construction of state law where no authoritative state court decision exists, we acknowledge that "[t]he views of a resident federal district judge concerning the local law of his home state are entitled to some deference by a appellate court." Corbitt v. Anderson, 778 F.2d 1471, 1475 (10th Cir. 1985); see also Inryco, Inc. v. CGR Bldg. Systems,

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5. Continued . . .
are not binding on a federal court applying state law in a diversity case nor necessarily indicative of how the state's highest court will resolve an issue of state law. See State Farm Mut. Auto Ins. Co. v. Travelers Indem. Co., 433 F.2d 311 (10th Cir. 1970); see also Guinand v. Atlantic Richfield Co., 485 F.2d 414 (10th Cir. 1973). Nonetheless, we cite the various state court decisions concerning section 8-2-116 to indicate the degree of uncertainty and disagreement among the courts which have addressed the existence of a private right of action under section 8-2-116.

Inc., 780 F.2d 879, 881 (10th Cir. 1986); Polin v. Dun & Bradstreet, Inc., 768 F.2d 1204, 1207 (10th Cir. 1985); An-Son Corp. v. Holland-America Ins. Co., 767 F.2d 700, 704 (10th Cir. 1985); Business Interiors, Inc. v. Aetna Casualty & Surety Co., 751 F.2d 361, 363 (10th Cir. 1984). However, "it is inappropriate to defer to the district court's views" where "another resident district court judge has expressed views contrary to those expressed by the trial court" in the case under review. Maughan v. SW Servicing, Inc., 758 F.2d 1381, 1384 n.2 (10th Cir. 1985) (McKay, J.); McGehee v. Farmers Ins. Co., 734 F.2d 1422 (10th Cir. 1984) (rule of deference to local federal district judge's interpretation not applied where contrary view expressed by another resident federal district

judge). As indicated by the cases cited earlier, federal district judges in Colorado disagree on the question of Colorado law before us. Because of that, and other facts unique to this case,[6] we are not confronted with any issue of deference to the disrict court's interpretation of Colorado law.[7]

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6. At the time of the district court's ruling in this case no Colorado state court had addressed the legal question before us. Thus, the district court did not have the benefit of even lower state court interpretatons. Since the ruling in this case there have been a number of lower Colorado state court decisions on the subject, the majority opposing the interpretation under review. As we indicated in Stafos v. Jarvis, 477 F.2d 369, 372-73 (10th Cir.), cert. denied, 414 U.S. 944, 94 S.Ct. 230, 38 L.Ed.2d 168 (1973), less deference is afforded the district court's view when the court of appeals is aided in its consideration by state court decisions. Furthermore, as the text of this opinion shows, there is adequate authority from Colorado state courts to guide our deliberations in this case.

7. The existence of widespread

7. Continued . . .
disagreement among lower Colorado state courts and federal district courts in Colorado makes this case a wholly inappropriate vehicle for testing the "local judge" rule, as the dissent wishes to do. The dissent indulges itself by citing seventy-two cases to establish the existence of that rule, but makes no effort to describe established exceptions. Not one of the cited cases involves a fact situation, similar to that in the instant case, where differing conclusions on a point of state law have been reached by resident federal district judges in the same state, and lower state courts have issued an array of decisions subsequent to the federal court decision. See infra note 14. Notably missing from the seventy-two cited cases is the dissenting judge's opinion, speaking for this circuit, to the effect that deference is inappropriate where local district judges differ. Maughan v. SW Servicing Inc., 758 F.2d at 1384 n.2. See also Catts Co. v. Gulf Ins. Co., 723 F.2d 1494 (10th Cir. 1983) (McKay, J., dissenting).

In sum, we are not abandoning any firmly established circuitwide rule. Rather, we are simply fulfilling our appropriate appellate function in this case. Indeed, we are following the exhortation of our dissenting brother to avoid making "this court's determination of legal issues in diversity cases little more than a will-o'-the-wisp." Catts Co. v. Gulf Ins. Co., 723 F.2d 1494, 1504 (1983) (McKay, J., dissenting).

We must, therefore, make our own independent inquiry into the proper interpretaton of state law, taking due note of the relevant state court and federal district court decisions. See, e.g., Big River Grain, Inc. v. SBA, 718 F.2d 968 (9th Cir. 1983); Luke v. American Family Mut. Ins. Co., 476 F.2d 1015 (8th Cir. 1972), cert. denied, 414 U.S. 856, 94 S.Ct. 158, 38 L.Ed.2d 105 (1973); Ward v. Hobart Mfg. Co., 450 F.2d 1176 (5th Cir. 1971); Mutual of Omaha Ins. Co. v. Russel, 402 F.2d 339 (10th Cir. 1968), cert. denied 394 U.S. 973, 89 S.Ct. 1456, 22 L.Ed.2d 753 (1969). In so doing, we "may look to all resources, including decisions of other states, as well as Colorado and federal decisions, and to the general weight and trend of authority." City of Aurora v. Bechtel

Corp., 599 F.2d 382, 386 (10th Cir. 1979); see also Burgert v. Tietjens, 499 F.2d 1 (10th Cir. 1974).

With that standard of review in mind, we turn now to an examination of Rawson's arguments that there is either an express or an implied private right of action under sections 8-2-116 and 117.

I. EXPRESS RIGHT OF ACTION

Rawson argues that, collectively, sections 8-2-116 and 8-2-117 of the 1903 Labor Relations Act and Sections 8-3-108 and 8-3-121 of the 1943 Labor Peace Act create an express right of action for age discrimination.[8] He claims that the

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8. Section 8-3-121 (1) provides:

Any person who suffers injury because of an unfair labor practice has a right of action, jointly and severally, against all persons participating in said practice for damages caused to the

language and history of both Acts and the fact that they occupy successive chapters in the same statutory title support his argument. We find his argument unpersuasive. The fact that the two Acts were enacted forty years apart is not alone dispositive; however, absent some clearer indication by the legislature of an intent to link the two Acts, we are reluctant to view the latter one as implicitly incorporating any provisions of the earlier one. Cf. Sterling v.

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8. Continued . . .
injured person thereby. Section 8-3-108 (1)(l) defines an unfair labor practice to include the commission of "any crime or misdemeanor in connection with **any controversy as to employment relations**" (emhasis added). Thus, Rawson argues that the violation of section 8-2-116 constitutes the commission of a crime or misdemeanor and, therefore, amounts to an "unfair labor practice" which is subject to an express right of action under sections 8-3-108 and 121.

Industrial Comm'n, 662 P.2d 1096 (Colo. App. 1982).[9]

In addition, from our review of the provisons of the Labor Peace Act and those Colorado cases discussing and interpreting it, we find no evidence that the Colorado legislature intended that Act to extend beyond union-related employer-employee disputes.

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9. Rawson argues that the incorporation into section 8-3-108 (1)(k) of the Labor Peace Act of the "blacklist" utilizd in the Labor Relations Act indicates that the two Acts should be read together and complement each other. We agree with Sears that such incorporation of the definition of a blacklist is more indicative of the legislature's intent not to incorporate violations of section 8-2-116 within the ambit of unfair labor practices than of an intent to link the two Acts together. See Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 100 S.Ct. 242, 62 L.Ed.2d 146 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979); Public Serv. Co. v. Federal Energy Regulatory Comm'n, 754 F.2d 1555 (10th Cir. 1985), cert. denied, 106 S. Ct. 849 (1986).

As Sears points out, in defining "labor dispute" in section 8-3-104(13)(b), the Act specifically states:

> The general right of an employer to select his own employees is recognized and shall be fully protected. It shall not constitute a labor dispute if an employer discharges or refuses to employ an employee on account of incompetence, neglect of work, unsatisfactory service, or dishonesty; but **the discharge of an employee or the refusal to employ an employee shall constitute a labor dispute only when such discharge or refusal to employ is founded upon membership in a union or labor organization or activity therein or when such discharge or failure to employ is in violation of a contract.**

Id. (emphasis added). In contrast, Rawson argues that the Act extends to dismissals of employees on the basis of age. He relies on the phrase "any crime or misdemeanor in connection with any controversy as to employment relations"

in section 8-3-108(1)(l) as evidence that the Labor Peace Act is interested in more than merely "labor disputes." Viewing the statutory scheme as a whole, however, we do not find the difference between "labor dispute" and "employment relations" indicative that sections 8-3-108 and 8-3-121 confer a right of action on persons alleging a violation of section 8-2-116. As Sears has also pointed out, the very name of the Act provides some guidance as to its intended scope. See U.M. v. District Ct., County of Lorimer, 631 P.2d 165 (Colo. 1981); Conrad v. City of Thornton, 191 Colo. 44, 553 P.2d 822 (1976); Blanchard v. Griswold, 121 Colo. 29, 214 P.2d 362 (1949).

Furthermore, except for the lower

court decision in this case, we can find no reported Colorado decision which has applied the Labor Peace Act and its express right of action to any context outside of union-related activities or disputes. See, e.g., Pipeliners Local Union No. 798 v. Ellerd, 503 F.2d 1193 (10th Cir. 1974); Denver Bldg. & Constr. Trades Council v. Shore, 132 Colo. 187, 287, P.2d 267 (1955); Bennett's Restaurant, Inc. v. Industrial Comm'n, 127 Colo. 281, 256 P.2d 891 (1953). In Bennett's Restaurant, the Colorado Supreme Court suggested that the Act as a whole is to be construed consistent with the view expressed in section 8-3-104(13)(b) when the court stated:

> "The act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them.

> The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and , on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. The tru purpose is the subject of investigation with full opportunity to show the facts."

256 P.2d at 894 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45, 57 S.Ct. 615, 628, 81 L.Ed. 893 (1937)). We, therefore, are unwilling to extend the provisions of the Labor Peace Act to situtations which do not involve union-related activities.[10]

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10. Finally, Rawson's alleged express right of action depends upon the commission of a "crime or midemeanor in connection with any controversy as to employment relations." Section 18-1-402 of Colorado's Criminal Code requires that the commission of any "offense" be proved

10. Continued . . .
beyond a reasonable doubt. Colo. Rev. Stat. Section 18-1-402 (1986). Here, there has been no prosecution of Sears and, a fortiori, no proof beyond a reasonable doubt that Sears committed any crime or misdemeanor. Rather, Rawson seeks here to show a violation of section 8-2-116 for the first time. The district court noted this problem when it stated that it:

> of course cannot determine whether the defendant has criminally violated C.R.S. Section 8-2-116. However, the Colorado legislature's broad definition of unfair labor practices **indicates an intent to create a private right of action to anyone who can prove by a preponderance of the evidence that a defendant has violated a criminal labor statute.**

Rawson, 530 F. Supp. 776, 778 (emphasis added). We do not believe that, for the purpose of an **express** right of action, the definition of unfair labor practices intends to abrogate the usual standard of proof for a criminal charge such as a criminal violaton of section 8-2-116. Rather, we view the reference to the commission of any crime or misdemeanor to require the usual showing, as specified in section 18-1-402, of proof beyond a reasonable doubt. While the "preponderance of the evidence" standard may

For the foregoing reasons, we find that Rawson has no express right of action for age discrimination under the statutes upon which he relies. We turn, therefore, to a consideration of whether an implied private right of action exists for age discrimination under section 8-2-116.

II. IMPLIED PRIVATE RIGHT OF ACTION

Rawson argues that the Colorado courts would imply a private right of action under section 8-2-116 under common law principles and asks us to affirm the district court's holding to that effect.

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10. Continued . . .
be appropriate for a private right of action **implied** under a statutory scheme, we are unwilling to endorse the incorporation of that standard in an **express** private right of action which depends upon the existence of a criminal violation.

We first examine the district court's ratoinale for concluding that a private right of action exists.

A. District Court's Analysis.

The district court, citing Touche Ross & Co. v. Redington, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979), observed that the implication of a private right of action "is a question of statutory construction." Rawson, 530 F. Supp. at 777. It then applied the four-part test established by the Supreme Court in Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975),[11] for determining the existence of an implied right of action under a federal statute.

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11. In Cort, the Court considered the following factors:

First, is the plaintiff "one of the class for whose **especial** benefit the statute was enacted," Texas & Pacific R. Co. v.

11. Continued . . .

Rigsby, 241 U.S. 33, 39, 36 S.Ct. 482, 484, 60 L.Ed. 874 (1916) (emphasis supplied)-- that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, e.g., National Railroad Passenger Corp. v. National Assn. of Railroad Passengers, 414 U.S. 453, 458, 460, 94 S.Ct. 690, 693, 694, 38 L.Ed.2d 646 (1974) (Amtrak). Third, is it consistant with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, e.g., Amtrak, supra; Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 423, 95 S.Ct. 1733, 1740, 44 L.Ed.2d 263 (1975); Calhoun v. Harvey, 379 U.S. 134, 85 S.Ct. 292, 13 L.Ed.2d 190 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based soley on federal law? See Wheeldin v. Wheeler, 373 U.S. 647, 652, 835 S.Ct. 1441, 1445-6, 10 L.Ed.2d 605 (1963); cf. J.I. Case Co. v. Borak, 377 U.S. 426, 434, 84 S.Ct. 1555, 1560-61, 12 L.Ed.2d 423 (1964); Bivens V. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 394-5 91 S.Ct. 1999, 2003-05, 29 L.Ed.2d 619 (1971); id., at 400, 91 S.Ct. at 2006-07 (Harlan, J., concurring in judgement).

422 U.S. at 78, 95 S.Ct. at 2087-88 (emphasis original).

The district court observed that "[b]ecause the present case involves a Colorado statute, the U.S. Supreme Court's analysis is not controlling; however, in the absence of any contrary word from the Colorado Supreme Court, the Cort test provides useful guidance." Rawson, 530 F. Supp. at 778. The district court concluded that "the first three elements of the Cort test are satisfied here." Id. The court found that section 8-2-116 "especially singles out employees between the ages of 18 and 60 who have been discharged solely because of their age." Id. The court then found the second part of the Cort test was met because "other statutes [sections 8-3-121(1) and 108(1)(1)] indicate that the Colorado Legislature intended to create a private

right of action here." Id. Finally, the court concluded that the third part of the Cort test was satisfied because "such a right of action is consistent with the state's legislative scheme in labor relations." Id.[12] The district court distinguished three Colorado Supreme Court cases sited by Sears, Quintano v. Industrial Comm'n, 178 Colo. 131, 495 P.2d 1137 (1972), Gladden v. Guyer, 162 Colo. 451, 426 P.2d 953 (1967), Colorado Cent. R.R. Co. v. Humphrey, 16 Colo. 34, 26 P. 165 (1891), as "inapposite."

We will examine Colorado law and, like the district court, draw "useful guidance" from the Supreme Court's case law concerning implied rights of action

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12. The district court correctly found the fourth part of the Cort test inapplicable to this case.

in reaching our conclusion as to the proper interpretaton of Colorado law.

B. Colorado Law on Implied Rights of Action.

As we have indicated, prior to the lower court decision in this case no Colorado court had addressed the question of whether an implied right of action exists for age discrimination under section 8-2-116.[13] The few decisions subsequent to the lower court case have provided little detailed analysis or explanation of court holdings concerning the existence or nonexistence of such an implied right of action.[14] Thus, we must

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13. Both parties agree that the legislative history of section 8-2-116, first enacted in 1903, sheds no light upon the question of the existence of a right of action under the statue.

14. In Boccallate v. Asamera Oil (U.S.) Inc. No. 86-CV-6283 (Denver Dist. Ct.

14. Continued . . .
Colo. Jan. 11, 1987), the state court found that "there is a private right of action for damages for violations of C.R.S. Secton 8-2-116." In so holding, it noted the Rawson decision,as well as the decisions in Grandchamp v. United Air Lines, Inc., 36 Empl.Prac. Dec. (CCH) paragraph 34,987 (D. Colo. Jan. 16, 1985) and Spulak v. K-Mart Corp., No. 85-F-2062 (D. Colo. Nov. 12, 1985), but rejected the reasoning of those cases and relied, instead, on Silverstein and the action of the Colorado legislature in repealing sectons 8-2-116 and 117 and incorporating age discrimination within the CAA. Similarly, in Sandro v. ICM Mortgage Corp. No. 86-CV-6 (Arapahoe Dist. Ct. Colo. July 1, 1986), the state court stated that it agreed with the defendant that "no private cause of acton is provided for a violation of Secton 8-2-116 C.R.S. . . . relying on the reasoning of Silverstein v. Sisters of Charity, 38 Colo. App. 286, 559 P.2d 716 (1976)." The state court in Laird v. Montgomery Ward, No. 85-CV-5569 (Denver Dist. Ct. Colo. April 23, 1986) likewise concluded that "[t]he legislature, however, did not specifically adopt a civil cause of action (as they could have and did in C.R.S. 8-2-108(2)) under this statute. It provided for a fine as its only sanction. Therefore,the Court does not have the authority to impose civil liability." By contrast, in Marks v. Cobe Laboratories, No. 85-CV-2726 (Jefferson Dist. Ct. Colo. Nov. 12, 1985), the state court specifically

14. Continued . . .
adopted the rationale of Rawson and concluded that a private right of action exists.

The federal district courts have been similarly divided. In Brezinski v. F.W. Woolworth Co., 626 F. Supp. 240 (D. Colo. 1986) and in Brenimer v. Great Western Sugar Co., 567 F. Supp. 218 (D. Colo. 1983), Judge Kane followed his own view in Rawson and reiterated that a private right of action exists under section 8-2-116. In both Spulak and Grandchamp, the district court employed the same reasoning as in Rawson. By contrast, the district court in Taylor v. K-Mart Corp., No. 85-M-2336 (D. Colo. Jan. 13, 1986) concluded that "there is no private right of action for a violation of C.R.S. Section 8-2-116." Similarly, the district court in Glover v. United Air Lines, Inc., No. 86-M-323 (D. Colo. June 24, 1986) dismissed the plaintiff's second claim stating "contrary to the view expressed in Rawson v. Sears Roebuck & Co., 530 F. Supp. 776 (D. Colo. 1982), and contrary to Marks v. Cobe Laboratories, No. 85-CV-2726 (Jefferson County District Court, Colorado) the Colorado statute in effect at the time of the operative facts in this case did not provide for a private right of action under C.R.S. 8-2-116, and the court being also of the view that the recent repeal of that statute and enactment of a specific age discrimination statute supports this conclusion."

make our own inquiry into Colorado law to determine the appropriate resolution of this issue.

We have found numerous Colorado cases which have expressed a general

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14. Continued . . .

In Silver v. St. Luke's Hosp., Inc., No. 84-M-2046 (D. Colo. May 3, 1985), the district court simply stated that, on the question of the existence of a private right of action under section 8-2-116, "[t]he state law is unsettled and should not be addressed in this case." In Borumka v. Rocky Mountain Hosp., 599 F. Supp. 857, 859 (D. Colo. 1984), the district court noted the Rawson decision but, because the "Colorado courts have not had the occasion to address the issue," the court declined to exercise pendent jurisdiction over the claims based on section 8-2-116; accord, Hensman v. Adams County Dep't. of Social Servs., 623 F. Supp. 96 (D. Colo. 1985); DiRito v. Ideal Basic Indus., Inc. 617 F. Supp. 79 (D. Colo. 1985). Finally, in Bouts v. United Air Lines, Inc., No. 83-F-1329 (D. Colo. Sept. 18, 1984), the district court denied the defendant's motion to dismiss or for summary judgment without prejudice as to the plaintiff's claim under section 8-2-116, without any explanation therefor.

unwillingness to expand upon statutory remedies specifically provided in a statutory scheme. Sears relies in particular upon Silverstein v. Sisters of Charity, 38 Colo. App. 286, 559 P.2d 716 (1976). There, the plaintiff, a physically disabled person, sued two health care corporations on the ground that they discriminated against her in violation of Colo. Rev. Stat. Section 24-34-801(1)(b) (1973) when they refused to hire her as a respiratory therapist. Section 24-34-801 did not expressly provide for civil actions for compensatory or exemplary damages. Furthermore, there was a criminal penalty for a violation of section 24-34-801 rendering such a violaton a misdemeanor. Nonetheless, the plaintiff argued that a private right of action should be

implied. The Colorado Court of Appeals disagreed. In so doing, it stated:

> The relevant portions of that statute confer new rights and duties unknown at common law, and provide criminal penalties for violations thereof. Where a statute creates legal duties and provides a particular means for their enforcement, the designated remedy excludes all others. Colorado Cent. R. Co. v. Humphreys, 16 Colo. 34, 26 P. 165 (1981). See also Board of County Commissioners v. HAD Enterprises, Inc., 35 Colo. App. 162, 533 P.2d 45 (1974). Here, there is no question but that the legislature could have authorized civil penalties for violation of the act. [citations omitted]. However, it chose to impose only a criminal sanction. Therefore, we have no authority to impose civil liability. Quintano v. Industrial Commission, 178 Colo. 131, 495 P.2d 1137 (1972). See also Swenson v. LaShell, 118 Colo. 333, 195 P.2d 385 (1948).

559 P.2d at 718. The court also rejected the plaintiff's argument that the inadequacy of the specified criminal

penalty indicated that an implied civil remedy was appropriate. "However, the legislature sought to deter such discrimination by making violation of the statute a misdemeanor; thus, we cannot disturb its apparent determination that the criminal penalty provided is an adequate remedy." Id.[15]

The Court of Appeals in Silverstein also indicated that its reluctance to expand upon specified statutory remedies extended even to "legislation designed to benefit particular individuals or

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15. In Cort v. Ash, the Supreme Court stated that the "provision of a criminal penalty does not necessarily **preclude** implication of a private cause of action for damages." 422 U.S. at 79, 95 S.Ct. at 2088 (emphasis original). Nonetheless, as we discuss further infra, the Supreme Court has made clear that when implying remedies under federal statutes, legislative intent is the touchstone, not necessarily the existence or nonexistence of a criminal penalty.

classes." Id. Relying on Quintano v. Industrial Comm'n, 178 Colo. 131, 495 P.2d 1137 (1972), the Court of Appeals cautioned "in the area of remedies in furtherance of legislative purposes the courts should proceed with great caution, leaving determination of the appropriate means of enforcement to the legislature." Id. at 718-19. Quintano involved the question of whether the Colorado Industrial Commission or any of its individual members could be liable under Colo. Rev. Stat. Section 80-2-1 (1963) in an action for damages the plaintiff allegedly suffered when a machine malfunctioned. Section 80-2-1 provides, in pertinent part:

> The industrial commission of Colorado shall be charged with the inspection of all factories, mills, workshops . .

> . . or any kind of an establishment wherein laborers are employed or machinery used, for the purpose of protecting said employees or guests against damages arising from imperfect or dangerous machinery . . .

Id. The Colorado Supreme Court affirmed the Court of Appeals' dismissal of the complaint against the Commission "on the basis of sovereign immunity," and against the individual Commission members, stating that:

> If the General Assembly has the intent that employees and guests may use this statute as the basis for civil liability, then its expression of this intent should be loud and clear, i.e., by authorizing the remedy.

495 P.2d at 1139.[16]

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16. The district court in this case distinguished Quintano, stating:

16. Continued . . .

> [T]he court held that it generally would not find an implied right of private civil action against a state agency in a new statute, because of the problems of sovereign immunity.

530 F. Supp. at 778 n.3. We do not completely agree with the district court's analysis of Quintano. After noting that the statute at issue in that case "specifically designates the classes of individuals for whose benefit it is intended," the court in Quintano stated that it affirmed the dismissal of the complaint against the individual commissioners "by reason of the philosophy of this court as expressed in Evans [v. Board of County Comm'rs, 482 P.2d 968 (Colo. 1971) in which] . . . [w]e said in effect that **there are certain fields, such as sovereign immunity**, in which the courts should leave establishment of substantive law to the legislative branch. We have the same view as to the matter under consideration." 495 P.2d at 1139 (emphasis added). Thus, we read the Colorado Supreme Court's language in Quintano more broadly that did the district court here. The court was not simply affirming the dismissal of the complaint because of sovereign immunity considerations; rather, its language evidenced a broader concern about judicial implication of liability under statutes where the legislature has not explicitly so provided.

Other cases in Colorado express the same general philosopy. See Board of Comm'rs v. Pfeifer, 190 Colo. 275, 546 P.2d 946, 949 (1976) ("in this case the legislature has clearly and expressly established the remedies available to the Board in order to enforce its subdivision requirement, and they are so limited."); Gladden v. Guyer, 162 Colo. 451, 426 P.2d 953, 957 (1967) ("It is for the legislature and not the judiciary to determine the penalty for violation of a statute. [citation omitted]. The penalty provided by the legislature for [violation of the statute] is a fine . . . . or imprisonment . . ., or both. To declare void a contract entered into without such certificate [as the statute required] would be enlarging upon the

penalties provided by the legislature."); [17] American Television & Communications Corp. v. Manning, 651 P.2d 440, 447 (Colo. App. 1982) ("where a statute creates legal duties which were nonexistent at common law and provides a

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17. The district court in Rawson also found Gladden "inapposite" because:

> the court held that a party's violation of a public cattle-testing statute did not void a contract it entered into, but only made it voidable. The court's decision therefore implies that the other party could exercise a right stemming from the statute to void the contract if so desired.

530 F. Supp. at 778 n.3. We disagree also with the district court's narrow interpretation of Gladden. The court in Gladden stated it would not declare the contract at issue void, but "[a]t most . . . merely voidable." 426 P.2d at 957. We do not believe that the court's opinion evidences a willingness to imply civil damages liability for the violation of a statute which does not so provide.

particular means for their enforcement, the designated remedy is exclusive, and courts should not imply new remedies to accompany the new right in the absence of some legislative indication or other circumstances that such a result was intended."); Hargreaves v. Skrbina, 635 P.2d 221, 227 (Colo. App. 1981) ("since no specific legislative authorization for attorneys' fees appears in the Longmont ordinance . . . an award of attorneys' fees would be improper. See Silverstein."), aff'd in part, rev'd in part, 662 P.2d 1078 (Colo. 1983); Board of County Comm'rs v. HAD Enterprises, Inc., 35 Colo. App. 162, 533 P.2d 45, 46 (1974) ("[the statute at issue] provides that one who violates the terms thereof shall be guilty of a misdemeanor and may be subject to a fine and imprisonment.

These provisions are the sole remedies under the act . . . . [W]here the legislature has not seen fit to authorize a particular remedy in a statute, we cannot supply one."); Farmers Group, Inc. v. Trimble, 658 P.2d 1370, 1378 (Colo. App. 1982) ("The General Assembly could have added the remedy of a private civil action for damages to its catalog of sanctions. It did not do so, however, and in the absence of any indicaton of contrary legislative intent, we must assume that the specific remedies designated by the General Assembly exclude all others."), aff'd on other grounds, 691 P.2d 1138 (Colo. 1984).

One of the more thorough discussions of Colorado law concerning implied rights of action is contained in Holter v. Moore & Co., 681 P.2d 962 (Colo. App. 1983), in

which the court stated:

> Colorado has accepted the guidelines set down by the United States Supreme Court in Cort v. Ash, 422 U.S. 66 [95 S.Ct. 2080, 45 L.Ed.2d 26] . . . (1975) as useful for determining whether a statute impliedly authorizes a private cause of action. Cloverleaf Kennel Club, Inc. v. Colorado Racing Commission, 620 P.2d 105 (Colo. 1980). There are three factors which determine whether a private remedy is implicit in a statute which does not expressly authorize such a remedy. They are (1) whether the plaintiff is within the class for whose benefit the statute was enacted, (2) whether the legislature has explicitly or implicitly intended to create a private remedy, and (3) whether an implied private remedy would be consistent with the purposes of legislative scheme. Cort v. Ash, supra.
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> The focus of the inquiry is whether the legislature intended to create a private cause of action. Touche Ross & Co. v. Redington, 442 U.S. 560 [99 S.Ct. 2479, 61 L.Ed.2d 82] . . . (1979). If the statute

expressly provides a remedy, courts must be chary of reading others into it. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 [100 S.Ct. 242, 62 L.Ed.2d 146] . . . (1979). In the absence of strong indicia of legisative intent to the contrary, courts are compelled to conclude that the legislature provided precisely the remedies it considered appropriate. Middlesex County Sewerage Authority v. Sea Clammers, 453 U.S. 1 [101 S.Ct. 2615, 69 L.Ed.2d 435] . . . (1981).

Applying these principles here, we note that Section 12-61-103 (2) does not contain language indicating a legislative intent to authorize private remedies for its violation. The statutory scheme authorizes the Commission to enforce compliance with the provisions and to discipline non-compliance . . . . Where a statute creates legal duties and provides a particular means of enforcement, the designated remedy is exclusive and courts are without authority to impose others. Silverstein v. Sisters of Charity, 38 Colo. App. 286, 559 P.2d 716 (1976). We find no "loud and clear" expression

> of legislative intent authorizing a private remedy for violations of Section 12-61-103(2) and Commission Rules C-4 through C-7. See Quintano v. Industrial Commission, 178 Colo. 131, 495 P.2d 1137 (1972). And in light of the enforcement procedures provided in the statutory scheme, coupled with lack of legislative intent authorizing a private cause of action, we must refrain from inferring one.

Id. at 964. See also Bennett v. Furr's Cafeterias, Inc., 549 F. Supp. 887 (D. Colo. 1982) (in finding that the applicable Colorado statute of limitations was not tolled, the district court stated that its holding was "in keeping with the general hesitancy of the courts to judicially except cases from applicable limitations statutes and is of a piece with the Colorado court's general approach to the problem of 'judicial

legislation.'" Id. at 892-93 (footnotes omitted)); Cloverleaf Kennel Club, Inc. v. Colorado Racing Comm'n, 620 P.2d 1051 (Colo. 1980); Agnello v. Adolph Coors Co., 695 P.2d 311 (Colo. App. 1984) (refusing to construe the CAA as providing any remedies in addition to those expressly provided therein); Red Seal Potato Chip Co. v. Colorado Civil Rights Comm'n, 44 Colo. App. 381, 618 P.2d 697 (1980) (similarly construing the CAA). All of these cases, we believe, provide persuasive evidence that the Colorado courts are reluctant to imply additional remedies in statutes where there is no clear legislative intent to do so.

In so finding, we note that another panel of this court has interpreted

Colorado law similarly. In Gammill v. U.S., 727 F.2d 950 (10th Cir. 1984), this court affirmed a district court decision that the plaintiffs could not maintain their action under the Federal Tort Claims Act, 28 U.S.C. Section 1346(b) (1982). The plaintiffs had contracted hepatitis allegedly because a civilian physician employed at a military installation failed to notify the public health authorities of infectious hepatitis in a family with whom the plaintiffs had contact, thereby preventing the plaintiffs from receiving effective inoculations. Such failure to notify violated Colo. Rev. Stat. Section 25-1-649 (1982),[18] a Department of the

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18. Section 25-1-649 provides as follows:

Army Regulation, and regulations at the military base concerning communicable diseases. This court agreed with the district court that the United States could not be held liable for a violation

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18. Continued . . .

> When any physician knows that any person whom he is called to visit or who is brought to him for examination is infected with smallpox, cholera, diphtheria, scarletfever, or any other disease dangerous to public health, he shall give notice immediately thereof to the health officer . . . . Every physician who refuses or neglects to give immediate notice, for each offense, upon conviction, shall be punished by a fine of not less than five dollars nor more than one hundred dollars. This penalty shall not be enforced against a physician if another physician in attendance has given to the health officer designated in this section an immediate notice of such sick person and the true name of the disease in accordance with the requirements of this section.

of section 25-1-649 in part because "Colorado courts have held that when a statute provides for criminal punishment, as does C.R.S. Section 25-1-649, the intent of the legislature is presumed to be that such punishment is in lieu of all other remedies." Gammill, 727 F.2d at 952. In so holding, we stated as follows:

> First, we note that Colorado courts have been extremely cautious in recognizing private rights of action "implied" by criminal statutes. This reluctance clearly stems from a concern within the Colorado judiciary of crossing over the bounds of the bench into the province of the legislature. See Quintano v. Industrial Commission, 178 Colo. 131, 495 P.2d 1137, 1139 (1972); Farmers Group, Inc. v. Trimble, 658 P.2d 1370, 1378 (Colo. App. 1982). In the present case C.R.S. Section 25-1-649 provides for a criminal fine ranging from five to one-

> hundred dollars. There is no indication that the legislature also intended to supplement this criminal penalty with a private civil right of action. The Colorado Supreme Court has observed that the creation of such rights "is not a subject in which we should attempt to infer such a legislative intent." Quintano, . . . 495 P.2d at 1138 . . . . In light of these strong statements, we will not conclude that the district court erred in not inferring a private right of action based upon C.R.S. Section 25-1-649.

Id. at 953 (footnote omitted).

Rawson endeavors to refute this line of cases with the Colorado Supreme Court's opinion in Travelers Ins. Co. v. Savio, 706 P.2d 1258 (Colo. 1985) which, he argues, implicitly overrules Silverstein. We disagree with Rawson's interpretation of Savio. The plaintiff in Savio brought a separate tort action against his employer's workmen's

compensation carrier for alleged bad faith handling of his claim. No express or implied right of action was invoked under the workmen's compensation statutes; the tort claim was specifically make independently of, not under, those statutes. The insurance company argued that the workmen's compensation statutes provided the exclusive remedy. The Colorado Supreme Court rejected that argument, finding that the Act and plaintiff's claim involved different conduct:

> Such overlap does not exist between our statutes and the tort of bad faith. The duty of an insurer under the Act to provide benefits and compensation is factually and analytically distinct from its duty to deal in good faith with claimants, even though such duties necessarily involve a common underlying physical injury.

706 P.2d at 1270. Thus, the major inquiry and holding in Savio addressed an issue wholly unrelated to the issue addressed in Silverstein, which was the existence of an implied private right of action under a penal statute. That is the obvious reason why neither Silverstein nor related cases were discussed by the Colorado Supreme Court in Savio; rather that a supposition that the parties and the court overlooked some important relationship between those cases and Savio.[19] Accordingly, we do not find that Savio has overruled Silverstein or those other Colorado cases.

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19. We note that the defendant in Savio argued that the existence of certain penalty provisions in the Workmen's Compensation Act, which specified a fine or business license suspension or

Other states have followed a view similar to that expressed in Silverstein and the other Colorado cases cited above. See e.g., Mein v. Masonite Corp., 109 Ill.2d 1, 92 Ill. Dec. 501, 504, 485 N.E. 2d 312, 315 (1985) (affirming dismissal of claim alleging wrongful discharge on account of age, and citing with approval Teale v. Sears Roebuck & Co., 66 Ill.2d 1, 3, Ill. Dec. 834, 359 N.E. 2d 473

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19. Continued . . .
revocation for insurers who violated the Act's provisions, defeated the plaintiff's common law causes of action. The court rejected that argument. We do not view that rejection as an implicit overruling of Silverstein and other Colorado cases. Rather, the court in Savio simply declined to find that the existence of those penalty provisions caused a particular act (bad faith handling of an insurance claim) to come within the purview of the statutory workmen's compensation scheme. The court did not address the issue of an **implied** private right of action under a penal statute. As indicated above, that issue simply was not the point of the case.

(1976) for the proposition that "[s]ince the [Age Discrimination] Act provided a criminal penalty for its violation, this language was interpreted as an internal restriction which 'strongly militates against, if indeed it does not preclude, expansion of the statutory sanction' to include a civil cause of action."); Fawcett v. G.C. Murphy & Co., 46 Ohio St. 2d 245, 348 N.E. 2d. 144, 147 (1976) (affirming dismissal of claims alleging wrongful discharge on account of age, and stating "it cannot be concluded that the General Assembly by 'clear implication' intended to create a civil action for damages for the breach of R.C. 4101.17. This court, therefore, is disinclined to read such a

remedy into that section.").[20] See also Wentworth v. Solem, 548 F.2d 773, 775 (8th Cir. 1977) (affirming dismissal of complaint alleging violation of statutes concerning the transportation in interstate commerce of goods manufactured by convicts, and stating "we find that [the plaintiff] cannot predicate a private claim on those statutes. [18 U.S.C. s]ections 1761-62 are criminal statutes and do not expressly create a private right of action.").

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20. Subsequent to the decision in Fawcett, the Ohio General Assembly amended the relevant statute to permit civil actions under that statute. Consequently, Fawcett does not represent current law regarding private civil actions for age discrimination in Ohio. See Garry v. TRW, Inc., 603 F.Supp. 157 (E.D. Ohio 1985). However, it does indicated the Ohio Supreme Court's view of the propriety of implying a private right of action under a statute which does not specifically provide one.

[2] Our review of Colorado cases, as well as those from other jurisdictions, convinces us that the Colorado Supreme Court would decline to imply a private right of action under Section 8-2-116. We believe that the Colorado legislature did not intend to provide any remedy for violations of Section 8-2-116 other than that expressly provided in Section 8-2-117. Accordingly, the district court erred when it concluded that an implied private right of action exists under Section 8-2-116.[21]

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21. One further matter bearing upon the existence or nonexistence of an implied private right of action under section 8-2-116 is the effect of the Colorado legislature's decision, effective January 1, 1985, to repeal sections 8-2-116 and 117 and to include age discrimination within the CAA. Each party reaches a different conclusion as to the meaning of

21. Continued . . .
the legislature's action. We note that "[s]tatutes may be passed purely to make what was intended all along even more unmistakeably [sic] clear." United States v. Montgomery County, 761 F.2d 998, 1003 (4th Cir. 1985); see also Johnson v. Continental West, Inc., 99 Wash.2d 555, 663 P.2d 482, 485 (1983). However, the legislative history on the bill effecting the change, House Bill 1198, provides no guidance as to the legislature's intent.

Rawson essentially argues that the decision to repeal Sections 8-2-116 and 117 and include age discrimination in the CAA evidences only an intent to put a limit on the type of damages available to age discrimination plaintiffs. It does not indicate, Rawson claims, that the legislature never intended a private right of action for age discrimination prior to the January 1, 1985 amendment.

Sears, by contrast, argues that the amendment of the CAA and the repeal of Sections 8-2-116 and 117 indicate that the legislature never intended to create a private right of action under Section 8-2-116. Noting this deficiency, the legislature repealed the current statutes and included age discrimination within the statutory scheme prohibiting all other forms of discrimination, which explicitly provides a specified remedy and procedure for aggrieved plaintiffs. The district court in this case rejected Sears' argument on this issue, stating:

Because the Colorado Supreme Court has stated, as did the district court in this case, that the Colorado courts draw "useful guidance" from the jurisprudence

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21. Continued . . .

> Defendant's argument is clever, but does not persuade me that a private right of action is not authorized by Section 8-2-116. I have compared the provisions of the proposed bill to the statute and find that their objectives are not totally dissimilar.

585 F. Supp. 1393, 1394-95.

We find, however, that absent any indication by the legislature of its intent in effecting these changes by means of House Bill 1198, we are simply engaging in speculation as to that intent. Both Rawson's and Sear's arguments on this point have some appeal, but we cannot reach any conclusion which assists us in our inquiry into the proper construction of Section 8-2-116. We accordingly acknowledge both parties' arguments but find they do not dissuade us from our conclusion, reached by carefully examining Colorado cases and those from other jurisdictions, that no implied private right of action exists under Section 8-2-116.

of the United States Supreme Court concerning implied rights of action, and because that jurisprudence provides additional support for our conclusion in this case, we turn to a brief review of that case law.

C. Supreme Court Law on Implied Rights of Action.

It is widely thought that Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 36 S.Ct. 482, 60 L.Ed. 874 (1916) was the first case in which the Supreme Court recognized an implied private right of action under a federal statute which did not itself provide one. Some commentators and courts believe the doctrine had its origins in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803) or even earlier. See e.g., Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran,

456 U.S. 353, 102 S.Ct. 1825, 72 L.Ed.2d 182 (1982); Foy, Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts, 71 Cornell L. Rev. 501 (1986); Note, Implying Civil Remedies from Federal Regulatory Statutes, 77 Harv. L. Rev. 285 (1963). For many years the Supreme Court followed an expansive or receptive view of the common law power of courts to imply remedies into statutory schemes where none existed. It followed some variation of the basic maxim "ubi jus ibi remedium" (where there is a right there is a remedy). See, e.g., Allen v. State Bd. of Elections, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969); J.I. Case Co. v. Borak, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964). In so doing, the Court looked into the language

and legislative history of the particular statute to determine Congressional intent concerning implied private rights of action and it considered whether the judicial implication of a remedy would advance or frustrate the purpose of Congress in enacting the particular statutory scheme. See, e.g., Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975); see also generally Ashford, Implied Causes of Action Under Federal Laws: Calling the Court Back to Borak, 79 Nw. U.L. Rev. 227 (1984); Frankel, Implied Rights of Action, 67 Va. L. Rev. 553 (1981). "During the 1940's, 1950's, and 1960's, the federal law of implied private actions began to flower." Foy, 71 Cornell L. Rev. at 559.

In 1975, in its decision in Cort v. Ash, 422, U.S. 66, 95 S.Ct. 2080, 45

L.Ed.2d 26 (1975), the Court endeavored to make explicit the criteria to be used in determining whether a private cause of action should be implied in a statute which does not provide one explicitly. It was those factors which the district court applied in this case. Since Cort, the question of Congressional intent has become the main concern and the other Cort factors have diminished in significance. The question of implication of private remedies is now viewed as a strict question of "statutory construction" to determine "whether Congress intended to create the private right of action asserted." Touche Ross & Co. v. Redington, 442 U.S. 560, 568, 99 S.Ct. 2479, 2485, 61 L.Ed.2d 82 (1979); see also Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 535-36 104 S.Ct. 831, 838,

78 L.Ed.2d 645 (1984); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n., 453 U.S. 1, 13 101 S.Ct. 2615, 2622-23, 69 L.Ed.2d 435 (1981); Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 639, 101 S.Ct. 2061, 2066, 68 L.Ed.2d 500 (1981); Shoultz v. Monfort of Colorado, Inc., 754 F.2d 318 (10th Cir. 1985), cert. denied, --U.S.--, 106 S.Ct. 1259, 89 L.Ed.2d 569 (1986). If Congressional intent on the question of an implied civil remedy can be discerned from the statute or its legislative history, further inquiry into whether the judicial implication of such a remedy would further or impede Congressional goals is unnecessary. Transamerica Mortgage Advisor, Inc. v. Lewis, 444 U.S. 11, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979).

In addition, in Touche Ross, the Supreme Court employed the familiar maxim "expressio unius est exclusio alterius" to find no implied liability where a statutory scheme contained provisions providing express liability elsewhere. Thus, there has been a distinct shift away from the full application of the Cort factors to a narrower exercise of statutory construction in order to glean Congressional intent. See e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 102 S.Ct. 1825, 72 L.Ed.2d 182 (1982); Transamerica Mortgage Advisor, Inc. v. Lewis, 444 U.S. 11, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979).[22]

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22. For a further discussion of this shift, see Ashford, Implied Causes of Action under Federal Law: Calling the Court Back to Borak, 79 Nw. U.L. Rev. 227 (1984); Foy, Some Reflections on

As the Eleventh Circuit has noted, "the Supreme Court has imposed increasingly severe restrictions on the availability of implied causes of action under federal statutes." Local Div. 732, Amalgamated Transit Union v. Metropolitan Atlantic Rapid Transit Auth. 667 F.2d 1327, 1334 (11th Cir. 1982).[23] Because

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22. Continued . . .
Legislation, Adjudication, and Implied Private Actions in the State and Federal Court, 71 Cornell L. Rev. 501 (1986); Frankel, Implied Rights of Action, 67 Va. L. Rev. 553 (1980); Note, Implied Causes of Action: A Product of Statutory Construction or the Federal Common Law: A Response to the Demise of Implied Federal Rights of Action, 94 Yale L.J. 1144 (1985).

23. One issue which has arisen in the context of the Supreme Court's increasing reluctance to imply private remedies in federal statutes is the source of that judicial power in the first place. "Some cases treat the implication of private actions as an exercise in construing the

23. Continued . . .
intent of the legislature . . . . An alternative theory is that in recognizing an implied private right of action, a court exercises an inherent judicial power to create common-law remedies for statutory violations." Frankel, supra note 22 at 557 (footnotes omitted). Compare J.I. Case Co. v. Borak, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964) and Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (Harlan, J., concurring in the judgment) (following the view that courts have an inherent judicial power under the common law to fashion remedies for violations of statutes) with Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979), Touche Ross & Co. v. Redington, 442 U.S. 560 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979) and Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) (Powell, J., dissenting) (following the view that courts lack the power to fashion remedies for statutory violations absent a clear expression of legislative intent to create such remedies). See generally Note, Implied Causes of Action, supra note 22.

In view of the Supreme Court's shift after Borak to a primary emphasis on legislative intent, it may be that the Supreme Court has adopted the former view--that federal courts lack the power to imply private remedies without clear legislative authorization to do so. See generally Frankel, supra note 22.

the Colorado courts draw "useful guidance" from the Supreme Court's cases on the question of implication of remedies and because our review of Colorado cases on the subject convinces us that the Supreme Court's increasingly

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23. Continued . . .

Because, in this case, we must construe the law of Colorado on implication of remedies where statutes provide none expressly, the Supreme Court's increasingly restrictive view of the power of federal courts to imply private remedies is arguably less significant to our decision on state law. State courts, as courts of general jurisdiction, are not subject to the same constraints concerning their power to imply remedies as are federal courts, which are courts of limited jurisdiction. "If the Court's restrictive doctrine of implication rests on the limited jurisdiction of the federal courts . . . the doctrine poses no obstacle to the creation of private rights of action under state law." Frankel, supra note 22 at 564 n. 64. Nonetheless, as the Colorado courts, including the lower court in this case, take "useful guidance" from the Supreme Court cases, so do we in endeavoring to construe Colorado law.

restrictive view of the availability of such judicially implied remedies is consistent with Colorado law on that issue, we view the restrictive trend in the Supreme Court as supportive of our conclusion in this case.

CONCLUSION

For the reasons set forth is this opinion, the decision of the district court denying Sears' post-trial motion for judgment notwithstanding the verdict is reversed; the judgments for costs and damages are vacated; and the case is remanded for entry of judgment dismissing the complaint.

McKAY, Circuit Judge, dissenting:

All panel members occasionally are tempted to ignore or reject a prior decision by another panel because it is inconvenient or, worse, objectionable. However, without being lawless, we are not at liberty to do so because of the clear and uniform rule that only the en banc court may reject established circuit authority. See United States v. Villano, 816 F.2d 1148, 1450 (10th Cir. 1987) (en banc) (en banc rehearing granted "to consider the propriety of changing [our] established rule"); Wion V. United States, 325 F.2d 420, 425 (10th Cir. 1963) (en banc) (en banc court convened "to reexamine our prevailing rule"), cert. denied, 377 U.S. 946 84 S.Ct. 1354, 12 L.Ed.2d (1964). The en banc rule is a sensible one which avoids chaos and makes

possible the consistent disposition of approximately 2,000 cases per year by at least 165 different panels (a number which does not even reflect our frequent use of visiting judges).

One of those rules which has often tempted me is the so-called "local judge" rule: in the absence of direct state precedent in diversity cases, we may not overturn a local district judge's interpretation of state law unless it is clearly erroneous. Perhaps no circuit rule is so sanctified by use and citation, the most recent being within the year. See Hauser v. Public Serv. Co., 797 F.2d 876, 878 (10th Cir. 1986) (in reviewing interpretation and application of state law by resident federal district court judge in a

diversity action, court of appeals is governed by the clearly erroneous standard); Weiss v. United States, 787 F.2d 518, 525 (10th Cir. 1986) (clearly erroneous standard); Corbitt v. Andersen, 778 F.2d 1471, 1475 (10th Cir. 1985) (some deference); Carter V. City of Salina, 773 F.2d 251, 254 (10th Cir. 1985) (clearly erroneous standard of Fed. R. Civ. P. 52(a) controls); Rhody v. State Farm Mut. Ins. Co., 771 F.2d 1416, 1419 (10th Cir. 1985) (great deference standard); Colonial Park Country Club v. Joan of Arc, 746 F.2d 1425, 1429 (10th Cir. 1984) (some deference standard); Taxpayers for the Animas-La Plata Referendum v. Animas-La Plata Water Conservancy Dist., 739 F.2d 1472, 1477 (10th Cir. 1984) (entitled to deference); Herndon v. Seven Bar Flying Serv., Inc.,

716 F.2d 1322, 1332 (10th Cir. 1983) (decisions may be overturned only where they are prejudicial and clearly erroneous), cert. denied, 466 U.S. 958, 104 S.Ct. 2170, 80 L.Ed.2d 553 (1984); King V. Horizon Corp., 701 F.2d 1313, 1315 (10th Cir. 1983) (clearly erroneous standard); Guild Trust v. Union Pac. Land Resources Corp., 682 F.2d 208, 210 (10th Cir. 1982) (court of appeals would follow view of district court as to what doctrine would be adopted by state supreme court); Loveridge v. Dreagoux, 678 F.2d 870, 877 (10th Cir. 1982) (if federal district court has spoken on matter of state law, question is one of law and appellate review is governed by the "clearly erroneous" standard of Fed. R. Civ. P. 52(a); Amoco Prod. Co. v. Guild Trust, 636 F.2d 261, 264, (10th

Cir. 1980) (views of resident district judge on matters of state law carry extraordinary force on appeal), cert. denied, 452 U.S. 967, 101 S.Ct. 3123, 69 L.Ed.2d. 981 (1981); Obieli v. Campbell Soup Co., 623 F.2d 668, 670 (10th Cir. 1980) (degree of deference standard); Farmers Alliance Mut. Ins. Co. v. Bakke, 619 F.2d 885, 888 (10th Cir. 1980) (extraordinary force standard); Fox V. Ford Motor Co., 575 F.2d 774, 783 (10th Cir. 1978) (trial judge presumed to be in a superior position to predict whether state supreme court would follow majority or minority position); Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp., 571 F.2d 1144, 1148 (10th Cir.) (extraordinary force standard, citing Rule 52(a)), cert. denied, 439 U.S. 862, 99 S.Ct. 183, 58 L.Ed.2d 171 (1978);

Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 561 F.2d 202, 204 (10th Cir. 1977) (clearly erroneous standard); Neu v. Grant, 548 F.2d 281, 287 (10th Cir. 1977) (extraordinary persuasive force standard); Cox v. Cox, 543 F.2d 1277, 1280 (10th Cir. 1976) (great weight standard); Matthews v. IMC Mint Corp., 542 F.2d 544, 546 n.5 (10th Cir. 1976) (district judge's view persuasive and ordinarily accepted); Land v. Roper Corp., 531 F.2d 445, 448 (10th Cir. 1976) (great weight standard); United States V. Hunt, 513 F.2d 129, 136 (10th Cir. 1975) (extraordinary force standard); Stevens v. Barnard, 512 F.2d 876, 880 (10th Cir. 1975) (extraordinary persuasive force standard); Budde v. Ling-Temco-Vought, Inc., 511 F.2d 1033, 1036 (10th Cir. 1975) (great weight and credence

standard); United States v. Wyoming Nat'l Bank, 505 F.2d 1064, 1068 (10th Cir. 1974) (most persuasive standard); Hardy Salt Co. v. Southern Pac. Transp. Co., 501 F.2d 1156, 1163 (10th Cir.) (resident district judge's views are persuasive and ordinarily accepted), cert. denied, 419, 95 S.Ct. 515, 42 L.Ed.2d 308 (1974); Casper v. Neubert, 489 F.2d 543, 547 (10th Cir. 1973) (resident district judge's view persuasive and ordinarily accepted); Julander v. Ford Motor Co., 488 F.2d 839, 844 (10th Cir. 1973) (clearly erroneous standard); Jorgensen v. Meade Johson Laboratories, Inc., 483 F.2d 237, 239 (10th Cir. 1973) (district judge's views persuasive and ordinarily accepted); Sade v. Northern Natural Gas Co., 483 F.2d 230, 234 (10th Cir. 1973) (resident district judge's views

persuasive and ordinarily accepted); Wells v. Colorado College, 478 F.2d 158, 161 (10th Cir. 1973) (clearly erroneous standard); Stafos v. Jarvie, 477 F.2d 369, 373 (10th Cir.) (extraordinary persuasive force standard), cert. denied, 414 U.S. 944, 94 S.Ct. 230, 38 L.Ed.2d 168 (1973); United States v. Hershberger, 475 F.2d 677, 681 (10th Cir. 1973) (great weight and credence standard); Binkley v. Manufacturers Line Ins. Co., 471, F.2d 889, 891 (10th Cir.) (clearly erroneous standard), cert. denied, 414 U.S. 877, 94 S.Ct. 130, 38 L.Ed.2d 122 (1973); Sta-Rite Indus., Inc. v. Johnson, 453 F.2d 1192, 1195 (10th Cir. 1971) (clearly erroneous standard), cert. denied 406 U.S. 958 (1972); Brennan v. University of Kansas, 451 F.2d 1287, 1291 (10th Cir.

1971) (clearly erroneous standard); Sutton v. Anderson, Clayton & Co., 448 F.2d 293, 297 (10th Cir. 1971) (clearly convinced to the contrary standard); Traders State Bank v. Continental Ins. Co., 448 F.2d 280, 282 (10th Cir. 1971) (clearly erroneous standard); Hardberger & Smylie v. Employers Mut. Liab. Ins. Co., 444 F.2d 1318, 1320 (10th Cir. 1971) (extraordinary persuasive force standard); Vaughn v. Chrysler Corp., 442 F.2d 619, 621 (10th Cir.) (knowledgeable and persuasive standard), cert. denied, 404 U.S. 857, 92 S.Ct. 106, 30 L.Ed.2d 98 (1971); Goodyear Tire & Rubber Co. v. Jones, 433 F.2d 6299, 631 (10th Cir. 1970) (clearly erroneous standard); Nevin V. Hoffman, 431 F.2d 43, 46 (10th Cir. 1970) (clearly erroneous standard);

Teague v. Grand River Dam Auth., 425 F.2d 130, 134 (10th Cir. 1970) (clearly erroneous standard); Brunswick Corp. v. J & P, Inc., 424 F.2d 100, 104 (10th Cir. 1970) (clearly erroneous standard); Parsons v. Amerada Hess Corp., 422 F.2d 610, 614 (10th Cir. 1970) (clearly wrong standard); Denning v. Bolin Oil Co., 422 F.2d 55, 58 (10th Cir. 1970) (manifestly wrong standard); Equitable Fire & Marine Ins. Co. v. Allied Steel Constr. Co., 421 F.2d 512, 514 (10th Cir. 1970) (clearly erroneous standard); Manufacturer's Nat'l Bank v. Hartmeister, 411 F.2d 173, 176 (10th Cir. 1969) (clearly erroneous standard); Douglas-Gardian Warehouse Corp. v. Jones, 405 F.2d 427, 428 (10th Cir. 1969) (not the province of court of appeal to settle uncertainties in state law); Continental

Casualty Co. v. Fireman's Fund Ins. Co., 403 F.2d 291, 336 (10th Cir. 1968) (trial court's conclusion should be accepted on appeal where there is no compelling indication of a contrary local rule); Adams v. Erickson, 394 F.2d 171, 173 (10th Cir. 1968) (clearly convinced to the contrary standard); Smith v Greyhound Lines, Inc., 382 F.2d 190, 192 (10th Cir. 1967) (clearly erroneous standard); Scott v. Stocker, 380 F.2d 123, 126 (10th Cir. 1967) (clearly erroneous standard); Stubblefield v. Johnson-Fagg, Inc., 379 F.2d 270, 273 (10th Cir. 1967) (clearly convinced to the contrary standard); Industrial Indem. Co. v. Continental Casualty Co., 375 F.2d 183, 185 (10th Cir. 1967) (clearly wrong standard); Jamaica Time Petroleum, Inc. v. Federal Ins. Co., 366 F2d 156, 159 (10th Cir.

1966) (clearly convinced to the contrary standard), cert. denied, 385 U.S. 1024, 87 S.Ct. 753, 17 L.Ed.2d 674 (1967); Pittsburgh-Des Moines Steel Co. v. American Sur. Co., 365 F.2d 412, 416 (10th Cir. 1966) (where state supreme court has not considered question, court of appeals will follow decision of resident district judge); Solomon v. Downtowner of Tulsa, Inc., 357 F.2d 449, 451 (10th Cir. 1966) (in absence of ruling of state court, court of appeals would accept opinion of resident federal judge); Bushman Constr. Co. V. Conner, 351 F.2d 681, 684 (10th Cir. 1965) (clearly erroneous standard), cert. denied, 384 U.S. 906 (1966); Bledsoe v. United States, 349 F.2d 605, 606 (10th Cir. 1965) (clearly erroneous standard); First Nat'l Bank & Trust Co. v. Foster,

346 F2d 49, 51 (10th Cir. 1965) (clearly wrong standard); Glenn v. State Farm Mut. Auto. Ins. Co., 341 F.2d 5, 9 (10th Cir. 1965) (clearly wrong standard); United States Fidelity & Gar. Co. v. Lembke, 328 F.2d 569, 572 (10th Cir. 1964) (clearly convinced to the contrary); Missouri Pac. R.R. Co. v. American Refrigerator Transit Co., 328 F.2d 569, 569 (10th Cir. 1964) (clearly erroneous standard); Robert Porter & Sons, Inc. v. National Distillers Prod. Co., 324 F.2d 202, 205 (10th Cir. 1963) (trial judge determination accepted if it is within general authorities on point); F & S Constr. Co. v. Berube, 322 F.2d 782, 785 (10th Cir. 1963) (clearly convinced to the contrary standard); Buell v. Sears, Roebuck & Co., 321 F.2d 468, 470 (10th Cir. 1963) (clearly convinced to the

contrary standard); Criqui v. Blaw-Knox Corp., 318 F.2d 811, 812-13 (10th Cir. 1963) (clearly convinced to the contrary standard); Dallison v. Sears, Roebuck & Co., 313 F.2d 343, 347 (10th Cir. 1962) (clearly convinced to the contrary standard); Hamblin v. Mountain States Tel. & Tel. Co., 271 F.2d 562, 564 n.1 (10th Cir. 1959) (extraordinary persuasive force standard); Cranford v. Farnsworth & Chambers Co., 261 F.2d 8, 10 (10th Cir. 1958) (court of appeals would leave undisturbed state law interpretation by local resident judge); Mitton v. Granite State Fire Ins. Co., 196 F.2d 988, 992 (10th Cir. 1952) (clearly erroneous standard).

The local judge rule is written for and applies only to cases, like the present, in which there is no direct

state supreme court precedent regarding the matter of state law in dispute, for the rule is unnecessary when the state supreme court has already spoken and has resolved the issue. As the majority concedes, the Colorado Supreme Court has not ruled on the question of whether there is a private cause of action for employment discrimination in Colorado. Yet, using as its justification the very absence of Supreme Court precedent that requires application of a clearly erroneous standard in this circuit, the majority proceeds to make its "own independent inquiry into the proper interpretation of state law," maj. op. at 911-912, unabashedly adopting a de novo standard of review.

The answer to the legal question given by the local district judge sitting

in Colorado in this case is not reversible under a disciplined application of the clearly erroneous standard of review. I believe the majority tacitly admits as much by its elaborate avoidance of the clearly erroneous rule and its application of a de novo standard. How could we conclude otherwise when trial courts in eight cases, both state and federal, have divided equally on the issue of whether Colorado law provides a right to be compensated for wrongful discharge? See maj. op. at 911. I find it hard to believe that this court could, with a straight face, conclude that either side of this deep division among respected state and federal jurists is clearly erroneous. Sound judgment surely suggests that one side does have the

better of the argument, of course, but that observation is a far cry from establishing that the other side is clearly erroneous under a logical and desciplined application of that standard of review.

I would happily join the panel in seeking the en banc abandonment of the clearly erroneous standard of review of state law issues. See Rhody, 771 F.2d at 1421 (McKay, J., concurring). This panel, however, is without power to ignore, rewrite, or reject it.[1] So long

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1. The majority's citation of Catts Co. v. Gulf Insurance Co., 723 F.2d 1494, 1503-04 (10th Cir. 1983) (McKay, J., dissenting) for the proposition that "deference is inappropriate where local district judges differ," maj. op. at 912 n.7, is inapposite. In that dissent, I urged only that our own prior appellate precedent regarding the interpretation of Oklahoma law controlled rather than the

1. Continued . . .
district judge's contrary analysis in that case. No conflict among federal district courts existed in Oklahoma with respect to the issue in question, and the Oklahoma courts had not addressed the subject. My dissent stood for the unremarkable proposition that we should abide by our own Tenth Circuit precedent under principles of stare decisis in the absence of subsequent Oklahoma authority.

The quotation excised from my footnote in Maughan v. SW Servicing, Inc., 758 F.2d 1381, 1384 n.2 (10th Cir. 1985), see maj. op. at 911, while concededly accurate, was notably selective. As a full reading of the foot note makes clear, the district court's opinion regarding the state law issue in that case was merely dicta and was therefore not controlling on appeal. The note's additional reference to the conflict with another district judge would not have been sufficient alone to justify deviation from our embedded rule.

Of course, the absurdity of deferring in separate cases to irreconcilable interpretations of the same state law issue is obvious, as my concurrence in Rhody, 771 F.2d at 1421, discusses at some length. My implied reference to this absurdity in Maughan is indicative of the temptation to which I alluded at the beginning of this opinion. My dicta in Maughan presaged the fuller

as the rule governs circuit review in diversity cases, this panel cannot overturn the trial court's interpretation of state law without rendering nugatory the clearly erroneous standard of review--a much greater mischief in the long run than affirming a result in this case with which the majority disagrees as a matter of first impression.

Even if we were at liberty to apply the majority's proposed de novo review standard, I cannot agree with its analysis of what Colorado law is or will

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1. Continued . . .
development of that concern in Rhody and my supplication for en banc reconsideration of the local judge rule herein. However, Maughan is not authority for deviating from the local judge rule when the district court's interpretation is not merely dicta but the basis upon which the holding rests. Admittedly, seeds were planted in Maughan, but only en banc action can harvest them.

be when the Colorado Supreme Court has occasion to rule on the matter in a pre-statute case.[2] My point of departure from the majority is a fundamental one, as it is rooted in our differing perspectives of what our proper judicial role should be in those diversity cases in which neither legislation nor prior judicial precedent clearly controls disposition. When the state legislature is silent or gives ambiguous messages, the majority perceives its hands to be tied; it considers itself without power to recognize a cause of action not explicitly blessed by the legislature.

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2. As the majority notes, the Colorado legislature has settled the matter for all future cases by placing complaints for discriminatory discharge based on age within the purview of the Colorado Civil Rights Commission. See Colo. Rev. Stat. Sections 24-34-401 to 406 (1982 & Supp. 1986).

This perspective is perhaps excusable, or at least understandable, given the defined and restricted role of federal courts in adjudicating causes of action under federal law. After all, there supposedly is no "federal general common law." Erie R. R. Co. v. Tompkins, 304 U.S. 64, 78, S.Ct. 817, 822, 82 L.Ed. 1188 (1938). We are taught that either Congress or the Constitution, see Bivens v. Six Unknown Named Fed. Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), creates all federal actions. We become accustomed to continually looking to the legislature for signs and clues as to the existence of and extent of the federal rights it establishes. When Congress appears to create a right without a remedy, we proceed to analyze under the principles

of Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), whether Congress impliedly fashioned a remedy, for we have no independent power to invent a federal cause of action. We must always look elsewhere.

This ingrained habit of envisaging all causes of action as emanating solely from either the legislature or the Constitution can easily skew the analysis in a diversity case. The majority in this case, borrowing heavily from federal principles and specifically citing Cort v. Ash, see maj. op. at 914-922 fell victim to this constraining habit of looking solely to statutory law in deciding whether Mr. Rawson has a cause of action in Colorado.

In a diversity case, however, our role is radically different, for there we

have the privilege of sitting as a common-law court. That Colorado courts are common-law courts is beyond dispute. See e.g., People v. Montgomery, 669 P.2d 1387, 1390 (Colo. 1983) (en banc) (recognizing discretionary sentencing power of courts as "derived from the common law"). The first task of a common-law court, of course, is to carry out, or abide by the restraints imposed by, the will of the legislature unless that will be prohibited by either the state or the federal constitution. Its second task is to fill in the interstices left by legislative enactments that are either general in nature or amibiguously express the legislative will. Its duties do not end there, however. Its further task, which is grounded in conservative doctrine antedating the founding of the

State of Colorado and even the nation, is to expand and contract causes of action, particularly those sounding essentially in tort, as wisdom and experience dictate. That function is, indeed, the majesty of the common law. Tort law itself was born and evolved not in legislative enactment but by this common-law method so fully accepted as a part of the traditional function of common-law courts. "Perhaps more than any other branch of the law, the law of torts is a battle ground of social theory." W. Prosser, Handbook of the Law of Torts Section 3 at 14-15 (4th ed. 1971).

The most common source of support for either the evolution of existing causes of action or for the first recognition of what is sometimes called a new cause of action is public policy.

Awards for pain and suffering and punitive damages are venerable examples of judicially evolved recoveries. The soundest and most conservative source traditionally tapped by courts when discerning public policy within the context of evolving tort actions has been legislative declarations that certain conduct is criminal.

> Criminal cases may be useful as guides to the type of conduct which the law will condemn or excuse, and the existence of a criminal statute may indicate a legislative policy which the courts will further by creating tort liability.
>
> . . .
>
> [T]he courts are seeking, by something in the nature of judicial legislation, to further the ultimate policy for the protection of individuals which they find underlying the statute, and which they believe the legislature must have had in mind.

Id. at Section 2 at 9, Section 36 at 191 (emphasis added). Thus directed by the clearest of all public policy guideposts, the courts need only award properly measured compensation to the victims of breaches of such unequivocally declared public policies.

Indeed, even the oft-used argument that the legislature would have explicitly created a private cause of action for breach of a criminal statute if it so intended is itself a common-law creation of the courts. It ought to be applied sparingly, if at all, because it turns the traditional presumption of the common law--that injuries occasioned by a known wrong are compensable--on its head. Common-law courts have not hesitated to be creative in defining causes of actions whenever a well-litigated case makes

clear that the new action carries out the basic tenet of awarding just compensation to the victim of a wrong.[3] Nor have they hesitated in abandoning or reformulating dated concepts when their obsolescence is made plain. See, e.g., O'Connor v. Boulder Colorado Sanitarium Ass'n, 105 Colo. 259, 96 P.2d 835 (1939) (en banc) (charitable immunity does not bar tort action, merely prevents levy against charitable trust).

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3. Unlike the majority, I perceive no sigificance in Mr. Rawson's failure to appeal the dismissal of several common-law causes of action. See maj. op. at 909 n.1. Mr. Rawson was the eventual **victor**, and his decision not to appeal the dismissal of his **alternative** grounds for victory only makes sound economic sense to me. Such failure does not reflect either positively or negatively on whether the Colorado Supreme Court would recognize this cause of action.

To its credit, the Colorado legislature in 1903 early recognized, by making such conduct criminal, that public policy clearly condemns the injury of an employee by unwarranted discriminatory discharge. Although the Colorado Supreme Court has not to date acknowledged the right of recovery for such injury, neither has it denied the right; it simply has not ruled on the issue. We can and must safely assume that the delay, in the grandest traditions of all common-law courts, is due to the absence of a well presented and soundly argued case, rather than indicative of some invented implication that no such right of recompense lies under existing principles.

In my view, the Colorado Supreme Court will be more likely, now that a

solid body of proper cases awaits appellate review, to include this cause of action among its cousins rather than invent some notion that the legislature intended by its silence to affirmatively prohibit the traditional exercise of the judicial function of fashioning sound remedies for known wrongs. It would be difficult for a common-law court to resist at this late date the recognition of the action, especially if it tried to resist by espousing its own invented rule regarding legislative action by silence.

The fact that the legislature has entered the field since these causes of actions arose and tailored a different kind of remedy for the future has no reasonable implication for these injuries of the past. As the courts are so fond of saying, the legislature is well aware

of the common-law process and function and, had it intended to limit this classic common-law function by retrospeetive application of the new statute, it would have said so.

The trial court in this case has developed a more-than-adequate record to show that this plaintiff has been wronged in violation of both general and legislatively declared public policy. The application of ancient and well respected rules of decision mandates that its judgment and that of its fact-finding common-law jury be affirmed.

Finally, even if I were to restrict myself to a statutory analysis in this case, I am persuaded that the district court's extensive and specific analysis of Colorado law with respect to express

and implied statutory rights of action is correct. See Rawson v. Sears, Roebuck & Co., 530 F. Supp. 776 (D. Colo. 1982); Rawson v. Sears, Roebuck & Co., 585 F. Supp. 1393 (D. Colo. 1984).

In view of this court's rejection of the basic cause of action, I need not reach the other issues raised by Mr. Rawson in his briefs and arguments. Had we recognized the right of recompense, we might have then examined whether the evidence supported the full amount of the award in this case. That examination might well have been disciplined by the subsequent legislative enactment. It is clear that the legislature, even with hindsight, did not reject the idea that a claim of discriminatory discharge based on age could be heard outside the

criminal context; it merely tailored and disciplined the application of the idea. With that in mind, we likely would have strictly scrutinized whether the plaintiff's evidence fully sustained the damages awarded.

Appendix

JULY TERM - July 28, 1987

Before Honorable William J. Holloway, Jr.,, Chief Judge, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha, Honorable Bobby R. Baldock, Circuit Judges, and Honorable Luther L. Bohanon, District Judge*

GARY RAWSON,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Nos. 85-1223
	)	and
SEARS ROEBUCK & CO.,	)	85-2366
	)	
Defendant-Appellant,	)	
	)	
EQUAL EMPLOYMENT ADVISORY COUNCIL,	)	
	)	
Amicus Curiae.	)	

Appellee's petition for rehearing is denied on the merits by the panel to whom the case was submitted.

The petition for rehearing having been denied on the merits, and the en

banc suggestion having failed to obtain a majority vote of the active circuit judges who are not recused, the suggestion for rehearing en banc is denied.

Judge Moore took no part in the consideration or disposition of the en banc suggestion.

ROBERT L. HOECKER
Clerk

By: Patrick Fisher
Chief Deputy Clerk

f the Western District of Oklahoma, sitting by designation

United States Court of Appeals
Tenth Circuit
Office of the Clerk
C404 United States Courthouse
Denver, Colorado 80294

March 5, 1986

Mr. Gregory A. Eurich
Mr. Charles M. Johnson
Holland & Hart
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Mr. Charles G. Bakaly, Jr.
Ms. Joanne B. O'Donnell
Ms. Debra Boyd
O'Melveny & Myers
400 So. Hope Street
Los Angeles, CA 90071

Re: No. 85 - 1223 and 85-2366 consolidated)
Gary Rawson vs. Sears Roebuck & Co.

Dear Counsel:

This Court has today assigned the captioned case to Calendar B, pursuant to Tenth Circuit Rule 10. Appellant's brief

shall be served and filed 21 days from the date of this letter. Appellee's brief shall be served and filed 21 days after service of appellant's brief. Appellant may serve and file a reply brief within 14 days of service of appellee's brief.

Ten copies of all briefs are required to be filed with the Court. Briefs must comply with Federal Rules of Appellate Procedure 28, 29, 31, and 32, except as otherwise provided by Tenth Circuit Rules 9, 10 and 11.

This appeal will be heard on the original record. An appendix may not be used without the Court's permission.

If the parties conclude that oral argument would not be of material assistance to the Court, they are

requested to file a motion for disposition of this case without argument. If such a motion is filed, the briefs and the trial court record will be reviewed by a panel of three judges. If the panel unanimously deterines that oral argument is not needed, the case will be submitted for determination without oral argument.

The parties are to address whether the issue of whether there is a private cause of action under C.R.S., section 8-2-116 should be certified to the Colorado Supreme Court.

Yours very truly,

HOWARD K. PHILLIPS,
Clerk

By: Virginia Booth
Deputy Clerk

cc: James A. Carleo, 10 Boulder Crescent, Suite 303, Colorado

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 85-M-2336

LESLIE O. TAYLOR,

Plaintiff,

v.

K MART CORPORATION,

Defendant.

ORDER DISMISSING SECOND CLAIM FOR RELIEF

Pursuant to the defendant's motion to dismiss, the briefs, and the hearing held on January 3, 1986, the court finds and concludes that the second claim for relief does not state a claim for relief because in this court's view there is no private right of action for a violation of C.R.S. sec. 8-2-116. The motion to dismiss will be denied as to the third claim for relif. Upon the foregoing, it

is

ORDERED that the second claim for relif of the plaintiff's complaint is dismissed for the failure to state a claim on which relief can be granted.

Dated: January 13, 1986

BY THE COURT:

Richard P. Matsch
Judge

87-681

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1987

GARY RAWSON,
Petitioner,

v.

SEARS, ROEBUCK AND COMPANY,
Respondent.

APPENDIX
PART II

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

James A. Carleo
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INDEX

Appendix

530 F.Supp.776

UNITED STATES DISTRICT COURT
D. COLORADO

Civ. A. No. 81-K-1454

GARY RAWSON,

Plaintiff,

v.

SEARS ROEBUCK & COMPANY,

Defendant.

January 27, 1982

MEMORANDUM AND OPINION

KANE, District Judge.

Plaintiff's complaint, which was originally filed in the Puelbo County District Court, alleges that the plaintiff was wrongfully fired from his employment with the defendant and, alternatively, that the defendant wrongfully refused to allow him to resign. He states 11 claims for relief and seeks compensatory and punitive damages. After the plaintiff filed this action, the defendant removed it to this court, which has subject matter jurisdiction under 28 U.S.C. Section 1332 (a).

Defendant moved to dismiss all of the plaintiff's claims, pursuant to F.R.Civ.P. 12(b)(6), arguing that none of them state a claim upon which relief may be granted. Briefs have been submitted

and the motion is now ripe for determination. I now grant the motion in part and deny it in part.

I. PRIVATE RIGHT OF ACTION

Plaintiff's first claim alleges that the defendant violated C.R.S. Section 8-2-116 by firing the plaintiff solely because of his age.[1] In its motion to dismiss, defendant argues that this fails to state a claim upon which relief may be

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1. C.R.S. Section 8-2-116 provides:
No . . . corporation conducting within this state any business requiring the employment of labor shall discharge any individual between the ages of eighteen and sixty years, solely and only upon the ground of age, if such individual is well versed in the line of business carried on by such . . . corporation and is qualified physically, mentally, and by training and experience to satisfactorily perform and does satisfactorily perform the labor assigned to him, or for which he applies.

granted because the statute does not grant the right to bring a private civil action. In support of this argument, defendant cites C.R.S. Section 8-2-117, which states that anyone who violates C.R.S. Secton 8-2-116 shall be subject to a fine of between $100 and $250. Defendant argues that this penalty provision means that the Colorado Legislature "has not seen fit to legislate any private civil right of action for violation of" C.R.S. Section 8-2-116. Defendant then cites, without any elaboration, a string of six cases.

Whether a particular statute grants a private right of action is a question of statutory construction. Touche Ross & Co. v. Redington, 442 U.S. 560, 568, 99 S. Ct. 2479, 2485, 61 L.Ed. 2d 82 (1979).

In Cort V. Ash, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed. 2d 26 (1975), the Supreme Court stated a four-part test for determining whether a federal statute has an implied private right of action:

> 1) [I]s the plaintiff 'one of the class for whose especial benefit the statute was enacted'--that is, does the statute create a federal right in favor of the plaintiff?
>
> 2) [I]s there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one?
>
> 3) [I]s it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?
>
> 4) [I]s the cause of action one traditionally relegated to state law in any area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?

(citations omitted, emphasis in original).

Because the present case involves a Colorado statute, the U.S. Supreme Court's analysis is not controlling;[2] however, in the absence of any contrary word from the Colorado Supreme Court,[3] the Cort test provides useful guidance.

[1] I conclude that the first three elements of the Cort test are satisfied here. First, C.R.S. Section 8-2-116

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2. Obviously the fourth element of the Cort test does not apply at all in the present case.

3. The three Colorado Supreme Court cases cited by the defendant are all inapposite. In Gladden v. Guyer, 162 Colo. 451, 459, 526 P.2d 953, 957 (1967), the court held that a party's violation of a public cattle-testing statute did not void a contract it entered into, but only made it voidable. The court's decision therefore implies that the other party could exercise a right stemming from the statute to void the contract if it so desired. In Colorado Centennial Railroad Co. v. Humphery, 16 Colo. 34, 36, 26 P. 165,

especially singles out employees between the ages of 18 and 60 who have been discharged solely because of their age. By stating his first cause of

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3. Continued . . .
165-66 (1891), the court considered a statute that specified the size and background of juries that would try certain cases. The court stated,

> If by statute a new power or right is conferred, and a particular form or manner of proceedings in connection therewith is provided, it is an exclusion of any other mode. Where a statue gives a new power, and at the same time provides the means of executing it, those who claim the power can execute it in no other way.

(citations omitted). I do not understand how this applies to the issue of what rights of action exist under a statute that is silent on the means of executing it. Finally, in Quintano v. Industrial Commission, 178 Colo. 131, 135-36, 495 P.2d 1137, 1139 (1972), the court held that it generally would not find an implied right of private civil action against a state agency in a new statute, because of the problems of sovereign immunity. Those considerations are obviously not present in a case between two private parties.

action, plaintiff has alleged that he is within this class. Second, other statutes indicate that the Colorado Legislature intended to create a private right of action here. C.R.S. Section 8-3-121(1) states,

> Any person who suffers injury because of an unfair labor practice has a right of action, jointly and severally, against all persons participating in said practice for damages caused to the injured person thereby.

C.R.S. Section 8-3-108(1)(1) provides that unfair labor practices include committing "any crime or misdemeanor in connection with any controversy as to employment relations." This court of course cannot determine whether the defendant has criminally violated C.R.S. Section 8-2-116. However, the Colorado legislature's broad definition of unfair

labor practices indicates an intent to create a private right of action to anyone who can prove by a preponderance of the evidence that a defendant has violated a criminal labor statute. I conclude that the Colorado legislature intended to create a private right of action under C.R.S. Section 8-2-116 and that such a right of action is consistent with the state's legislative scheme in labor relations. Plaintiff's first claim for relief therefore will not be dismissed.

II. OUTRAGEOUS CONDUCT

Plaintiff's second claim alleges that defendant "willfully, wantonly, and maliciously fired the [p]laintiff, . . . and would not allow him to resign with dignity." It then alleges that

defendant's actions constitute outrageous conduct. His third claim alleges that defendant's acts were intended to "cause extreme emotional distress to the [p]laintiff," and did in fact do so. Defendant's motion to dismiss simply states,

> Plaintiff's Second and Third Claims for Relief do not state a claim upon which relief can be granted for outrageous conduct resulting in emotional distress and is (sic) properly subject to dismissal.

In Rugg v. McCarty, 173 Colo. 170, 476 P.2d 753 (1970), the Colorado Supreme Court considered the tort of intentional or reckless infliction of emotional distress. In that case the plaintiff has alleged that she had entered into a $180 health studio contract, became disabled at the first lesson and was then unable to continue

her exercise sessions. After one of the defendants refused to allow her to rescind the contract, she continued to make payments, reducing the unpaid balance to $44.50. Although she had promised to pay that balance, her complaint alleged that the defendants repeatedly harassed her with numerous phone calls and letters demanding payment, and inquired with her employer about garnishing her wages, even though they did not have an outstanding judgment against her. Her complaint further alleged that defendants' acts

> were done **wilfully and wantonly** in disregard of her rights; and that the acts of the defendants were done **intentionally** with the **intention of causing [her] to suffer mental anguish, embarrassment, humiliation and extreme mental suffering.**

Id. at 173, 476 P. 2d at 754 (emphasis in

original).

The court found that this stated a cause of action, and reversed the trial court's granting of defendants' motion to dismiss. Id. at 177, 476 P.2d at 756. The court adopted Rest.2d Torts Section 46 (1965):

> Outrageous Conduct Causing Severe Emotional Distress:
>
> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, . . .

The court also quoted a Restatement Comment

> liability has been found only in those cases where the defendant's conduct has been extreme and outrageous.
>
> '* * * Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all

> possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally the case is one in which a recitation of the facts to an average member of community would lead him to exclaim, "Outrageous!"'

Id. (emphasis in orginal, quoting Rest. 2d Torts Section 46, comment d, at 73).

Several subsequent Colorado Court of Appeals cases have considered intentional or reckless infliction of emotional distress. Because I must determine whether a particular fact pattern is sufficient to state a claim under this tort, I will summarize the facts of these previous cases.

Three appellate cases upheld jury findings of intentional infliction of emotional distress. In Enright v. Groves, 39 Colo. App. 39, 560 P.2d 851,

854 (1977), a scuffle resulted after the defendant police officer wrongfully demanded to see plaintiff's driver's license. The appellate court found the police officer's uncompromising conduct and his handcuffing and propelling of defendant to be substantial evidence to support the jury's verdict. In DeCicco v. Trinidad Area Health Association 40 Colo. App. 63, 573 P.2d 559, 562 (1977), the defendants refused to furnish the requested ambulance service to plaintiff's wife because her attending physician had recently resigned from the defendant's hospital. The appellate court found that the jury's verdict for the plaintiff was reasonable, because the defendants' action delayed taking a critically ill person to a hospital. In Meiter v. Cavanaugh, 40 Colo. App. 454,

580 P.2d 399, 400-01 (1978), the defendant, a lawyer, intentionally breached a house sales contract with the plaintiff, who was not sophisticated in legal matters, by refusing to vacate the house by the date required. The defendant also called the plaintiff offensive names, wrongfully threatened court action against her, and then left the house that he had sold to her in a seriously damaged condition. The appellate court noted that any one of these actions would probably not survive a directed-verdict motion, but that together they supported the jury's verdict. 580 P.2d at 401.

One appellate case sustained a trial court judgment in favor of the defendant in an intentional infliction of emotional distress case. In Paris V. Division of

State Compensation Insurance Fund, Colo. App., 517 P.2d 1353, 1355 (1973), the defendant had sent the plaintiff, a paraplegic, a letter of reprimand, which also stated that his job had been created for him because of his handicap. The appellate court affirmed the trial court's finding that this did not establish a case for intentional infliction of emotional distress.

Four appellate cases affirmed trial courts' dismissing intentional infliction of emotional distress claims before trial. In Deming v. Kellogg 41 Colo. App. 264, 583 P.2d 944, 945-56 (1979), the court affirmed the trial court's dismissal of outrageous conduct claim stemming from an automobile accident. In Hansen v. Hansen 43 Colo. App. 525, 608 P.2d 364, 365-66 (1979), the court

affirmed the trial court's granting summary judgment to a defendant sued by her son, who had alleged that plaintiff's failure to support him had caused him severe emotional harm. In First National Bank in Lamar V. Collins, Colo. App., 616 P.2d 154, 156 (1980), the plaintiff alleged that one of the defendants had made misrepresentations regarding an associated store that the plaintiff would operate. While the appellate court found that the plaintiff had stated a claim for negligent misrepresentation, it also held that he had not stated a claim for intentional or reckless infliction of emotional distress. Finally, in Vigoda V. Denver Urban Renewal Authority, Colo. App., 624 P.2d 895, 898 (1981) (cert. granted by Colorado Supreme Court), the appellate court affirmed the trial

court's conclusion that various pre-contract negotiations and actions by the defendant did not state a claim for intentional infliction of emotional distress.

The first four Colorado Court of Appeals cases indicate that the question of whether defendant has caused intentional or reckless infliction of emotional distress is often a question of fact to be determined by trial. The last four cases demonstrate, however, that there is a certain threshold level of conduct that must be established for the plaintiff to state a cause of action. Because all of these cases are based largely on their own facts, it is difficult to ascertain the standards necessary for the cause of action. I do note, however, that there are certain

similarities in the cases that have recognized a cause of action. In two, Rugg v. McCarty and Meiter v. Cavanaugh there was a pattern of conduct by the defendant that either intentionally or recklessly caused severe emotional distress to the plaintiff. In the other two, Enright v. Groves and DeCicco v. Trinidad Area Health Association, the plaintiffs' causes of action were predicated on public or quasi-public officials severely abusing their duties and responsibilities. In contrast, the cases finding no cause of action did not involve either patterns of conduct calculated to cause emotional distress or severe abuses of discretion by public officials.

[2] In many, if not most, civil

lawsuits the plaintiff believes that the defendant's conduct has been outrageous. Most lawsuits also cause the plaintiff (and often the defendant) emotional stress. Yet very few fact situations give rise to a cognizable claim for intentional infliction of emotional distress. The spate of complaints precipitated by the Rugg v. McCarty case which include claims for outrageous conduct tend to make the critical reader think that there is a lot less there than meets the eye.

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.

Rest. 2d, Torts Section 46, comment d, at 73. I conclude that claims for intentional infliction of emotional distress will normally only be cognizable in cases where the defendant has engaged in a pattern of conduct that either has intended to cause or recklessly did cause severe emotional distress. While it is possible for a single, isolated activity to be a sufficient basis for a cause of action, it only will be so where a public or quasi-public official has severely abused his discretion or private individual has blatantly and severely harassed another.

[3] In the present case plaintiff alleges that he had been an employee of the defendant for 33 years and the manager of defendant's Pueblo store for the last 14 years. He then alleges that

the defendant "willfully, wantonly, and maliciously fired the [p]laintiff, . . . and would not allow him to resign with dignity, and that the defendant intended to cause the plaintiff severe emotional distress. These allegations do not state either a sufficiently outrageous pattern of conduct or a sufficiently outrageous isolated incident. Clearly there is not a sufficient recitation of facts to lead an average member of the community to exclaim, "outrageous." The second and third claims are insufficient to state a claim for extreme and outrageous conduct, and therefore are dismissed.

III. BREACH OF CONTRACT

[4, 5] Plaintiff's fourth claim for relief alleges

> That the acts of the Defendant, Sears, constitute a breach of contract.

Defendant moved to dismiss this claim, arguing that no contract, express or implied is alleged in the complaint. Plaintiff responds that C.R.S. Section 8-2-116 "created by law" a contract between the plaintiff and the defendant. This argument is without merit. While plaintiff has stated a cause of action under C.R.S. Section 8-2-116, that statute does not also create an independent breach-of-contract action unless there was in fact a contract.

F.R.Civ.P. 8(a)(2) requires only that the complaint state

> a short and plain statement of the claim showing the the pleader is entitled to relief.

The plaintiff is thus not required to state all the elements of a particular

claim, but only state ~~facts~~ sufficient to give the opposing party fair notice of the claim. See C. Wright & A. Miller, Federal Practice and Procedure Section 1218, at 134 (1969). Plaintiff's fourth claim does not give this fair notice and therefore is dismissed.

IV. PROMISSORY ESTOPPEL

Plaintiff's fifth claim alleges that he relied to his detriment on statements and representations of the defendant and that these acts of the defendant "constitute promissory estoppel, or a breach thereof." Defendant responds that plaintiff has not alleged "any basis sufficient to satisfy the promissory elements of estoppel." In Mooney v. Craddock 35 Colo. App. 20, 530 P.2d 1302, 1305 (1974), the court stated that

the doctrine of promissory estoppel

> should be applied to prevent injustice where as here, a promise was made which the promisor should reasonably have expected would induce action or forbearance of a material character and the promise in fact induced such action or forbearance.[4]

[6] Plaintiff's complaint alleges that the defendant "told, promised, and inferred (sic) to the plaintiff that he would have a job with Sears until his retirement." The complaint then alleges that plaintiff did several acts to his

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4. The court cited Rest. Contracts, Section 90, which states:

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promisee.

detriment in reliance on defendant's representations.[5] This is sufficient to state a claim under the promissory estoppel doctrine.

V. WRONGFUL DISCHARGE

[7] Plaintiff's sixth claim alleges that the defendant's acts "constitute the tort of wrongful discharge." In Lampe v. Presbyterian Medical Center 41 Colo. App. 465, 590 P.2d 513 (1978), the court held that:

> In the absence of special consideration or an express stipulaton as to the duration of employment, an indefinite general hiring is terminable at will by either party.

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5. These allegations are contained in complaint paragraphs that are not incorportated into the fifth claim for relief. I do not consider this to be a material defect here, where the defendant received notice of the allegations.

590 P.2d at 514. The court noted that this rule would not apply if a plaintiff claimed that he was discharged for exercising a "specifically enacted right [or] duty," such as the right to file for workmen's compensation or the duty to serve on a jury. 590 P.2d at 515. In this present case, however, plaintiff does not allege that he was fired for exercising any specific right or duty. He therefore does not state a claim for the tort of wrongful discharge.

IV. REMAINING CLAIMS FOR RELIEF

[8] Plaintiff's seventh and eighth claims allege that defendant's failure to give plaintiff an opportunity to "retire with dignity" constitutes outrageous conduct. For the reasons stated in section II, supra, I conclude that these

claims should be dismissed.

[9] Plaintiff's ninth claim alleges that defendant's failure to allow him to retire with dignity constitutes breach of contract. For the reasons stated in section III, supra, I conclude that this claim should be dismissed.

[10] Plaintiff's tenth claim alleges that defendant's failure to allow him to retire with dignity states a claim for promissory estoppel. While it is not clear how this states any claim beyond that stated in the fifth claim I conclude, for the reasons set forth, in Section IV, supra, that this claim should not be dismissed.[6]

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6. Defendant's brief does not elaborate why the seventh through eleventh claims should be dismissed, but merely states,

[11] Plaintiff's eleventh claim alleges that defendant's acts constitute the tort of wrongful discharge. For the reasons stated in section V, supra, I conclude that this claim should be dismissed. It is

ORDERED that defendant's motion to dismiss is granted in part and denied in part. Plaintiff's second, third, fourth, sixth, seventh, eighth, ninth, and eleventh claims for damages are hereby dismissed. It is further

ORDERED that defendant shall answer plaintiff's remaining claims within ten days of the date of this order.

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6. Continued . . .
To the extent that Plaintiff's Seventh through Eleventh Claims fail to state a claim for relief based on the grounds discussed above, those claims should also be dismissed.

Appendix

554 F.Supp.327

UNITED STATES DISTRICT COURT
D. COLORADO

Civ. A. No. 81-K-1454

GARY RAWSON,

Plaintiff,

v.

SEARS, ROEBUCK AND CO.,

Defendant.

January 10, 1983

MEMORANDUM AND OPINION

KANE, District Judge.

This matter is now before me on a motion for summary judgment by defendant, Sears, Roebuck and Co. In a previous memorandum opinion and order (January 27, 1982), 530 F.Supp. 776, I dismissed several claims for relief and allowed the plaintiff to proceed on the first, fifth, and tenth claims of his complaint. These remaining claims are based on allegations of age discrimination, which is a violation of C.R.S. 1973 Section 8-2-116 (1st claim for relief), and promissory estoppel (5th and 10th claims for relief). Sears now contends that collateral estoppel precludes the plaintiff from asserting the issue of age discrimination, or in the alternative that the facts support a summary judgment in favor of the defendant. Sears also

argues that as a matter of law defendant is entitled to a summary judgment on the promissory estoppel claims because the facts show no promise to the plaintiff, and in any case no reasonable reliance by the plaintiff. In addition to briefs submitted by both parties, the record includes numerous exhibits, depositions, and affidavits. The motion is now ripe for determination.

Plaintiff Gary Rawson was an employee of Sears, Roebuck and Co. from March, 1946 to March, 1979. He was the manager of the Sears store in Pueblo from 1965 until his termination in 1979. Shortly after he was discharged, Rawson filed a claim for unemployment compensation with the Colorado Division of Employment. The Division of Employment initially ruled to disqualify Rawson from receiving benefits

for 12 weeks. He appealed and after an evidentiary hearing the decision was reversed by a Division referee who ordered a full award of benefits. Sears appealed this ruling and obtained another reversal from the Industrial Commission, who again disqualified Rawson from receiving 12 weeks of benefits. This ruling was based on a review of the record, and a finding of questionable job performance and a failure to properly administer employer procedures. Rawson petitioned the Commission for review of its order, and after it was affirmed by a final order of the Commission, he appealed to the Colorado Court of Appeals. The Court of Appeals, in affirming the Industrial Commission, determined there was sufficient evidence to support the conclusion that improper

activity by the plaintiff caused his discharge. The date has now passed for timely appeal to the Supreme Court. The instant suit was filed in a Colorado District Court and removed to this court by Sears, Roebuck.

Both plaintiff and defendant rely on Pomeroy v. Waitkus, 183 Colo. 344, 517 P.2d 396 (1973) to determine whether the doctrine of collateral estoppel is applicable under these circumstances. Defendant also relies on Kremer v. Chemical Construction Corp., ____U.S.____, 102 S.CT. 1883, 72 L.Ed.2d 262 (1982); Umberfield v. School District No. 11, 185 Colo. 165,522P.2d 730 (1974); and Colorado Springs Coach Co. v. State Civil Rights Commission, 35 Colo. App. 378, 536 P.2d 837 (1975), cert. denied 424 U.S. 948, 96S. Ct. 1420, 47 L.Ed. 2d

355 to support its argument that a final administrative order affirmed by the court of appeals must be given full faith and credit in the federal district court.

[1] Pomeroy discusses a four part test which must be met before invoking the doctrine of collateral estoppel. The four elements include:

1) Was the issue decided in the prior adjudication identical with the one presented in the action in question?

2) Was there a final judgment on the merits?

3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

4) Did the party against whom the plea is asserted have a full and

fair opportunity to litigate the issue in the prior adjudication?

It is clear that elements two and three are satisfied in this case. However, one and four present more difficult questions. I need not evaluate the hearing procedures to determine the due process issue of the fourth element because I find that the issue decided in the prior adjudication is not identical with the one before me in the instant suit. After reviewing the various findings of fact and orders issued throughout the administrative procedures and judicial review, I can find no mention whatsoever of the issue of age discrimination. It is evident from the Industrial Commission's Findings of Fact And Order that the rulings were based solely on evidence concerning Rawson's

conduct. Possible discrimination by Sears was never mentioned. The order states in part, "In reviewing the entire record, the Commission finds that the claimant was responsible for his own separation from employment due to questionable performance of his job and failure to properly administer employer procedures." (exhibit C) The final order details the conduct of plaintiff more fully, but again never raises the issue of discrimination.[1] Judicial review concerned only whether the evidence presented was sufficient to sustain the findings. It could not consider other issues de novo. Because this cause of action does not meet the test set out in Pomeroy, the plaintiff is not collaterally estoppel from bringing the action in this court. I therefore

turn to defendant's alternative argument for summary judgment on the discrimination claim. [2,3] It is well settled that a motion for summary judgment can be granted only if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. Pleadings, documents, and factual inferences tending to show issues of material fact must be viewed in the light most favorable to the party opposing summary judgment. The summary judgment must be denied unless

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1. Collateral estoppel, unlike res judicata, is not concerned with issues that could have been, but were not raised in the previous adjudication. However it is unlikely that the issue of age discrimination could have been fully resolved at an unemployment compensation hearing since the commission has no authority to grant the relief requested by the plaintiff.

the moving party demonstrates its entitlement beyond a reasonable doubt. Norton v. Liddel, 620 F.2d 1375 (10th Cir. 1980). Defendant has presented a persuasive argument that age discrimination did not contribute in any way to the termination of Gary Rawson. Conversely, plaintiff's arguments in support of a discrimination claim are based heavily on speculation and conjecture. Mere unsupported allegations or conclusory statements do not suffice to put a factual issue in dispute. However, since the nature of a discrimination claim involves issues of intent and state of mind, in addition to credibility of witnesses, I cannot resolve this as a matter of law. Therefore, summary judgment on the discrimination claim is denied.

Plaintiff's remaining claims are founded on the doctrine of promissory estoppel, which is based on the Restatement (Second) of Contracts Section 90:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

The Supreme Court of Colorado recently issued the following guideline in applying the doctrine of promissory estoppel:

> We believe that the doctrine as set forth in the Restatement should be applied to prevent injustice where there has not been mutual agreement by the parties on all essential terms of a contract, but a promise was made which

> the promisor should reasonably have expected would induce action or forbearance, and the promise in fact induced such action or forbearance.

Vigoda v. Denver Urban Renewal Authority, Colo., 646 P.2d 900, 905 (1982).

[4] Rawson has alleged in his complaint that the defendant "told, promised, and inferred to the plaintiff that he would have a job with Sears until his retirement." Sears contends that no such promise was ever made to Rawson, either before or after he was employed with the Company. Defendant's brief contains numerous citations to Rawson's deposition in which he enumerates the statements he relied on. None of these amounts to a promise by Sears. Further, when Rawson was first employed by Sears he signed an employment contract which included the following terms:

> [M]y employment and compensation can be terminated, with or without cause, and with or without notice, at any time, at the option of either the Company or myself. I understand that no store manager or representative of Sears, Roebuck and Co., other than the president or vice-president of the Company, has any authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing.

(Defendant's brief in support, P. 12 and exhibit 1, Rawson deposition.) In his deposition Rawson stated that he was unaware of any other contract between himself and Sears or any written or oral amendments relating to his employment contract since he signed the original document. (Rawson deposition, pp. 118-119).

Finally, by his own admission Rawson agrees that he cannot recall any such

promise being made to him. During the deposition, defendant's attorney asked if there had been any agent or representative of Sears who "made any statement to you, that told you, promised to you or inferred to you that you would have a job with Sears until your retirement?" Rawson responded, "Not that I can recall." (Rawson deposition, p. 87.)

Plaintiff's brief in opposition to the motion for summary judgment does not dispute the contention that a promise was never made. It does include statements and depositions of several other people on what their understanding was regarding continued employment, as long as they were performing in a satisfactory manner. This information is not relevant to the issue of whether a promise was made by Sears to Rawson that he would have a job with Sears

until his retirement.

It is clear from the uncontroverted evidence before me that Rawson cannot rely on the doctrine of promissory estoppel.

IT IS ORDERED that summary judgment is granted on claims numbered five and ten.

IT IS FURTHER ORDERED that summary judgment is denied on claim number one alleging age discrimination.

Appendix

585 F.Supp.1393

UNITED STATES DISTRICT COURT
D. COLORADO

Civ. A. No. 81-K-1454

GARY RAWSON,

Plaintiff,

v.

SEARS, ROEBUCK & COMPANY,

Defendant.

January 20, 1984

MEMORANDUM AND OPINION

KANE, District Judge.

On January 30, 1984 a jury of seven found that Sears Roebuck and Co. violated Colo. Rev. Stat. Section 8-2-116 when it terminated Gary Rawson from his job as manager of its Pueblo store in March of 1979. Defendant moved for a directed verdict at the end of the plaintiff's case and the end of its own case. I denied both motions. Since the date of jury verdict, the following briefs and motions have been filed for my consideration: Plaintiff's motion for partial summary judgment on the issue of Sears' liability under Section 8-2-116; Plaintiff's brief supporting an award of damages pursuant to the January 30, 1984 verdict in his favor; Defendant's brief opposing damages; Defendant's motions for

judgment notwithstanding the verdict or in the alternative for a new trial; Defendant's motion to strike portions of plaintiff's response to its motion for judgment notwithstanding the verdict or in the alternative for a new trial and to strike portions of the plaintiff's response brief in support of full damages.

I. MOTIONS FOR JUDGMENT N.O.V. and FOR NEW TRIAL

A. Private Right of Action Under Colo. Rev. Stat. Section 8-2-116

[1] Defendant first contends that I should overturn the verdict in this case because of the recent introduction of House Bill 1198, which according to defendant, indicates that the Colorado Legislature never intended to create a private right of action for plaintiffs

who establish a violation of Section 8-2-116. House Bill 1198 amends Colo. Rev. Stat. Section 24-34-301 et. seq. to include age discrimination among the designated unfair labor practices. Defendant argues that "the legislature would not consider enactment of House Bill 1198 without repealing the clearly inconsistent provisions of Section 8-2-116," Brief at 4, and that the only reason House Bill 1198 contains no reference to 8-2-116 is because the legislature recognizes that Section 8-2-116 is a penal statute, "the violation of which does not create a private right of action in the injured party." Id.

Defendant's argument is clever, but does not persuade me that a private right of action is not authorized by Sections 8-2-116. I have compared the provisions

of the proposed bill to the statute and find that their objectives are not totally dissimilar. See Rawson v. Sears, Roebuck & Co., 530 F. Supp. 776 (D. Colo. 1982).

B. Statute of Limitations Defense

[2] Defendant also claims that plaintiff's cause of action is time barred by Colo. Rev. Stat. Section 8-3-110(16) or in the alternative by Colo. Rev. Stat. Section 13-80-104. I need not discuss the merits of this defense because of the defendant's failure to comply with Rule 8(c) F.R.Civ.P. Since defendant failed to assert the statute of limitations defense in its answer, it is deemed waived. See Radio Corporation of America v. Radio Station KYFM, Inc., 424 F.2d 14, 17 (10th Cir. 1970).

C. Evidence Supporting the Verdict

[3] The gist of defendant's final argument for overturning the jury verdict in favor of Gary Rawson is that the evidence does not support a finding that he was terminated solely and only because of age. According to defendant, a plaintiff who seeks relief under Colo. Rev. Stat. Section 8-2-116 must separately prove each of the five elements in the statute and that mere proof of the first four elements does not create an inference that plaintiff was discharged solely and only because of age. Defendant bases this interpretation on the grounds that the statute is penal and not remedial.

> The statute at issue reads as follows: No person, firm association, or corporation conducting within this state

> any business requiring the employment of labor shall discharge any individual between the ages of eighteen and sixty years, solely and only upon the grounds of age if such individual is well versed in the line of business carried on by such person, firm, association, or corporation and is qualified physically, mentally, and by training and experience to satisfactorily perform and does satisfactorily perform the labor assigned to him or for which he applies.

Colo. Rev. Stat. Section 8-2-116 (1973). As defendant interprets the statute, Rawson had to show: 1) that he was within the protected class, ages 18-60 years, at the time of discharge; 2) was well versed in the line of business carried on by Sears; 3) was qualified physically and mentally to perform his job as manager of the Pueblo store; 4) was satisfactorily performing the job as manager at the time he was discharged; 5)

and that he was discharged solely and only because of age.

There are no cases construing the burden of proof necessary to establish a violation of Section 8-2-116 and defendant's interpretation is not persuasive. As I read the statute, once a plaintiff establishes the first four elements, he is entitled to an inference that he was the victim of discrimination on the basis of age. The evidence presented in this case required the submission of that issue to the jury. In reaching this conclusion, I am guided by the standards announced in Joyce v. Atlantic Richfield Co., 651 F.2d 676 (10th Cir. 1981):

> When faced with a motion for judgment notwithstanding the verdict, the standards by which the prerequisite motion

> for directed verdict is judged control. Judgment notwithstanding the verdict may only be granted where the evidence 'points all one way and is susceptible of no reasonable inferences that sustain the position of the party against whom the motion is made.' A mere scintilla of evidence is insufficient to justify the denial of the motion. However, since the grant of such a motion deprives the nonmoving party of a determination of the facts by a jury, judgment notwithstanding the verdict should be cautiously and sparingly granted. (citations omitted).

651 F.2d at 680. Applying those standards to this case, I find that plaintiff produced more than a "mere scintilla" of evidence tending to prove the defendant's discriminatory conduct. I must therefore deny the motions for judgment notwithstanding the verdict and for a new trial. See Blim v. Western Electric Co., Inc., 731 F.2d 1473 (10th

Cir. 1984) (denying judgment notwithstanding the verdict and motion for a new trial in ADEA case).

II. DAMAGES FOR VIOLATING COLO. REV. STAT. SECTION 8-2-116

A. The Right to Recover Damages Under Colo. Rev. Stat. Section 8-3-121

[4] Plaintiff seeks to base his recovery of damages from the defendant on Colo. Rev. Stat. Section 8-3-121. Section 8-3-121 provides that "[a]ny person who suffers injury because of an unfair labor practice has a right of action, jointly and severally, against all persons participating in said practice for damages caused to the injured person . . . ." Colo. Rev. Stat. Section 8-3-121 (1973). An unfair labor practice has been defined as the commission of "any crime in connection

with any controversy as to employment relations." Colo. Rev. Stat. Section 8-3-108(1)(1)(1973). Despite this clear language and the conclusions of law in my earlier opinion on this matter, defendant insists that plaintiff cannot recover damages under Section 8-3-121 because the statute only provides a remedy for injuries received as a result of engaging in union activity or any activities related to collective bargaining. I disagree.

Defendant ignores that portion of my earlier opinion where I succinctly stated that: "The Colorado legislature's broad definition of unfair labor practices indicates an intent to create a private right of action to anyone who can prove by a preponderance of the evidence that a defendant has violated a criminal labor

code." Rawson, 530 F. Supp. at 778. Pursuant to the jury verdict of January 30, 1984, plaintiff proved by a preponderance of the evidence that the defendant violated Section 8-2-116. He may therefore seek damages under 8-3-121.

B. Damages Recoverable Under Section 8-3-121

[5] The final issue presented is what type of damages can a victim of age discrimination recover under Section 8-3-121. The language of the statute is not helpful as it only states that any victim of an unfair labor practice "has a right of action . . . against all persons participating in said practice for **damages caused to the injured person thereby.**" (emphasis added). I must therefore decide if damages under this section include those recoverable in a

common law tort action.

The authority for awarding punitive as well as compensatory damages under Section 8-3-121 is scant. Plaintiff however, has cited the Colorado Supreme Court decision in Denver Building and Construction Trades Council v. Shore, 132 Colo. 187, 287 P.2d 267 (1955) as supporting such an award. The plaintiff in Denver Building sought damages and injunctive relief under Section 80-5-19(1) of the Labor Peace Act. Section 80-5-19 is the predecessor to Section 8-3-121. The following language in the case has been cited by plaintiff as supporting the theory that any damages recoverable under Section 8-3-121 are based in tort:

> Admitting that in the Laburnum case the tort was excessive and that in the present case it was

> mild and devoid of any rowdyism, **nevertheless, in either case a recovery in damages for injury done on account of the illegal practice is necessarily upon the basis of tort.** (emphasis added).

287 P.2d at 272. The words "on account of the illegal practice" refer to unfair labor practices as defined in the Labor Peace Act. I therefore conclude that the term damages as used in Section 8-3-121 of the Act includes those damages recoverable in a common law tort action. See also Pipeliner's Local Union No. 798 v. Ellerd, 503 F.2d 1193, 1201 (10th Cir. 1974) ("recovery of damages for injury incurred as a result of illegal practices is founded in tort . . ." citing Denver Building and Construction Trades Council v. Shore).

Defendant opposes this interpretation and argues that such an

award cannot be made under Section 8-3-121 because the statute does not specifically provide for the recovery of such damages. Defendant supports its argument by referring to the Age Discrimination in Employment Act, 29 U.S.C. Section 626(b), (c), and the recent Tenth Circuit decision in Perrell v. FinanceAmerica Corp., 726 F.2d 654 (10th Cir. 1984). In Perrell, the Tenth Circuit held that the trial court committed "fundamental error" when it tendered jury instructions on the availability of compensatory damages under the ADEA. The court reasoned that such damages are not "provided within the enforcement scheme of the ADEA." 726 F.2d at 657. The court did not specifically state whether punitive damages are available under the ADEA. I assume,

however, from reading the cases supporting the decision that they are not recoverable in this circuit.[1] Nevertheless, the Tenth Circuit's interpretation of the ADEA does not prevent this plaintiff from seeking punitive and compensatory damages under Section 8-3-121. First, the language of the ADEA is totally dissimilar to the language in the state statute[2] and second, the Colorado Supreme Court in

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1. Judge Moore reached the same conclusion in Smith v. Montgomery Ward & Co., Inc. 567 F.Supp. 1331, 1334 (D. Colo. 1983). But see contra Wise v. Olan Mills, Inc. of Texas, 485 F.Supp. 542 (D. Colo. 1980) (Carrigan, J.); Kennedy v. Mountain States Tel. & Tel., Co., 449 F.Supp. 1008 (D. Colo. 1978) (Kane, J.).

2. Section 626(b) of the ADEA allows a person to seek any "legal or equitable relief." Section 8-3-121 gives a right of action for "damages caused to the injured person thereby."

Denver Building recognized that any damage remedy under Section 8-3-121 is based in tort.

III. MOTION TO STRIKE

Defendant has asked me to strike portions of plaintiff's briefs filed in support of full damages and opposing defendant's motions for judgment notwithstanding the verdict and for a new trial, on the grounds that they violate Rule 12(f), F.R.Civ.P. Rule 12 (f) allows me to order stricken from any pleading any insufficient defense or redundant, immaterial, impertinent, or scandalous matter. "Immaterial matter is that which has no essential or important relationship to the claim for relief or the defenses being pleaded, . . . " Wright & Miller, Federal Practice and

Procedure: Civil Section 1382 at 822 (1969). "Impertinent matter consists of statements that do not pertain, and are not necessary, to the issues in question." Id. at 825. See also Equal Employment Opportunity Commission v. Ford Motor Company, 529 F.Supp. 643, 644 (D. Colo. 1982) ("so unrelated to plaintiff's claims as to be unworthy of any defense.").

[6,7] I agree with defendant that certain portions of plaintiff's briefs are immaterial and impertinent within the meaning of Rule 12(f). Yet, defendant must demonstrate that it will be unduly prejudiced if these allegations are not stricken. Defendant has not met that burden. It is fundamental that a motion to strike will be denied if no prejudice

can result from the challenged allegation, "even though the matter literallly is within the categories set forth in [r]ule 12f." Wright & Miller, Federal Practice and Procedure: Civil Section 1382 at 810-811 (1969). The fact is that such immaterial and impertinent matters do not impress me. The effect, miniscule as it is, is counterproductive to the plaintiff's object.

IT THEREFORE ORDERED THAT:

The defendant's motion to strike is denied. Defendant's motions for judgment notwithstanding the verdict and for a new trial are also denied. Plaintiff's motion for partial summary judgment on the issue of defendant's liability for violating Colo. Rev. Stat. Section 8-2-116 is granted. Plaintiff may seek

compensatory and punitive damages[3] for Sears' violation of Section 8-2-116.

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3. In order to recover punitive damages, plaintiff will have to prove beyond a reasonable doubt that Sears discharged him with "malice." See Colo. Rev. Stat. Section 13-21-102 (1973); Frick v. Abell, 198 Colo. 508, 602 P.2d 852 (1979).

Appendix

615 F.Supp.1546

UNITED STATES DISTRICT COURT
D. COLORADO

CIV. A. No. 81-K-1454

GARY RAWSON,

Plaintiff,

vs.

SEARS, ROEBUCK AND COMPANY,

Defendant.

August 28, 1985

MEMORANDUM AND OPINION

KANE, District Judge.

Plaintiff's Complaint was filed in July, 1981, in the District Court in and for the County of Pueblo. It was removed to the United States District Court for the District of Colorado. On January 27, 1982, all but three of the plaintiff's claims for relief were dismissed. Rawson v. Sears, Roebuck and Co., 530 F.Supp. 776 (D. Colo. 1982). In that same opinion, I held a that private right of action could be implied under C.R.S. Section 8-2-116.

On January 10, 1983, I granted summary judgement in favor of Sears on two of the plaintiff's remaining three claims. Rawson v. Sears, Roebuck and Co., 554 F.Supp 327 (D. Colo. 1983). I denied Sears' motion for summary judgment

on plaintiff's claim of violation of C.R.S. Section 8-2-116, holding that the findings and order of the Colorado Industrial Commission, affirmed by the Colorado Court of Appeals, did not collaterally estop plaintiff from litigating the issue of the reason for plaintiff's discharge. I also denied Sears' Motion for Reconsideration and Sears' Motion for Summary Judgment or, in the Alternative, for Certification of Questions of Law.

On January 20, 1984, I issued an order granting and denying pre-trial motions. I granted Sears' request for a separate trial on the issue of liability, pursuant to Rule 42, Fed.R.Civ.P. I further ordered that because Mr. Jansen had testified at his deposition that the

reason for plaintiff's discharge was the mishandling of inventory, Sears would not be allowed to introduce any statements or testimony relating to incidents or conduct of the plaintiff other that those related to the inventory charges.

On January 30, 1984 a jury of seven found that Sears, Roebuck and Co. violated Colo. Rev. Stat. Section 8-2-116 when it terminated Gary Rawson from his job as manager of its Pueblo store in March of 1979. Defendant moved for a directed verdict at the end of plaintiff's case and at the end of its own case. I denied both motions.

On July 15, 1985 a new jury of six was selected to try the issue of damages. Trial proceeded to conclusion. Instructions of law were given to the

jury without objection. On July 19, 1985 the jury returned its verdict awarding the plaintiff damages against the defendant in the following amounts:

> A. $580,500.00 for lost wages and benefits from the date the plaintiff would have retired.
>
> B. $264,410.00 for future wages and benefits and reduction in the value of pension benefits from the date of verdict discounted to present value.
>
> C. $5,000,000.00 for pain, suffering and humiliation, both past and future.

The jury also found, according to Colorado law, beyond a reasonable doubt that the injuries and losses complained of by the plaintiff were attended by circumstances of malice or a wanton or reckless disregard of the rights and feelings of the plaintiff and awarded $10,000,000.00 as exemplary damages.

Defendant has moved for judgment notwithstanding the veredict or, in the alternative for a new trial or remittitur. Defendant makes the following four arguments:

1. **This court should enter judgment in favor of Sears notwithstanding the verdict with respect to the jury's award of punitive damages.**

Defendant submits that the jury verdict of $10,000,000.00 for punitive damages is unsupported by the evidence and thus seeks judgment N.O.V. Sears claims that the evidence presented at trial demonstrates that its conduct did not meet the standard required to justify punitive damages ("beyond a reasonable doubt"). It also claims that plaintiff failed to show an evil intent or reckless disregard of his rights and feelings,

which is necessary for the award of punitive damages. Rather, defendant points to plaintiff's own misconduct during his employment with Sears, conceded by plaintiff at trial, as supportive of its articulated reasons for discharging plaintiff.

2. **The compensatory damages for pain and suffering awarded by the jury are excessive and contrary to the evidence.**

Defendant states that $5,000,000.00 awarded by the jury for pain, suffering and humiliation is grossly excessive and unreasonable. Defendant calls on me to exercise sound discretion to prevent a miscarriage of justice. Defendant states that the "law in this District is clear that a 'federal trial judge has not only the discretion to grant a new trial in

order to prevent a miscarriage of justice, but it is his **obligation** to do so where it appears to him that the verdict has been arbitrary and against the clear weight of the evidence.'" Atchison, Topeka and Santa Fe Railway Company v. Hadley Auto Transport, 216 F.Supp. 94, 97 (D. Colo. 1963) (see pp. 6-7 of Defendants' Brief). Defendant also notes that exercise of such a power by the court "is not in derogation of the right of trial by jury but is one of the historic safeguards of that right." Holmes v. Wack, 464 F.2d 86, 88 (10th Cir. 1972).

Defendant further observes that the Tenth Circuit in Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 703 F.2d 1152, 1168 (10th Cir. 1981) has set

down guidelines for whether an award by a jury of **either** compensatory or punitive damages can be set aside.

> We have said that absent an award so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the damages is considered inviolate. Metcalf v. Atchison, Topeka and Santa Fe Railway Co., 491 F.2d 892, 898 (10th Cir.) . . . Such bias, prejudice or passion can be inferred from excessiveness. Wells v. Colorado College, [478 F.2d 158, 162 (10th Cir.)] . . . However, a verdict will not be set aside on this basis unless it is so plainly excessive as to suggest that it was the product of such passion or prejudice on the part of the jury. [Id.] . . .
>
> Such cases recognize the principle that if the court determines that the verdict was the result of passion or prejudice, or for any other reason it appears that the jury erred or abused its discretion

> not only on the issue of damages but also on the issue of liability, the court must unconditionally order a new trial and cannot give the plaintiff the option to accept a lesser amount . . . .
>
> However, another remedy is also recognized. Where the court concludes there was error only in an excessive damage award, but not one also tainting the finding of liability, the appellate court may order a remittitur and alternatively direct a new trial if the plaintiff refuses to accept the remittitur, a widely recognized remedy. Holmes v. Wack, 464 F.2d 86, 89 and n. 3 (10th Cir.) . . .

While defendant agrees it is an emotional event for plaintiff to lose a job he has held all his working life, it opines that the "award for pain and suffering returned by the jury, however, suggests that Rawson's depression and despondency has a compensatory value of several times that of a traumatic

physical injury such as would render an individual a quadraplegic" (see p. 9 of Defendant's Brief.) (Defendant cites two recent Colorado district court cases awarding quadraplegic plaintiffs $4,900,000 and $4,100,000 for pain and suffering, loss of income, and medical expenses.) (See p. 9 of Defendants Brief.) Defendant also notes that plaintiff's counsel suggested a figure of $1,000,000.00 as appropriate damages for pain and suffering. Thus, defendant claims, the jury's verdict was excessive and not reasonably based upon the evidence at trial.

3. **The damages awarded by the jury for economic loss are also excessive and unreasonable and a new trial should be granted.**

Without citing any case law and relying entirely upon the expert testimony of Dr. Wykstra regarding plaintiff's loss of wages, defendant claims that the jury's award of damages for lost wages and benefits as well as future wages and benefits was in excess of any evidence in the record. Based on such testimony, the defendant asserts that the jury award of $580,500.00 for lost wages and benefits should be reduced to $314,000.00. It also asserts that the jury award for economic loss exceeded any evidence on the subject by $101,510.00. Thus, defendant requests a new trial on all issues relating to wage loss, past and future.

4. The punitive damages awarded by the jury are grossly excessive and

unreasonable, and a new trial should be granted.

Defendant states a new trial must be granted because of the extraordinarily excessive amount of punitive damages awarded by the jury. While defendant concedes a jury has discretion in making punitive damages awards, it notes that such damages are subject to the supervision of the court which may order remittitur or a new trial to prevent a miscarriage of justice. Defendant further notes that in Colorado the amount of punitive damages awarded must bear some relation to the gravity of the injuries sustained by plaintiff and to the amount of compensatory damages, Frick v. Abell, 198 Colo. 508, 602 P.2d 852, 854 (1979); and the degree of the defendant's malice must also be

considered in determining the proper relationship between punitive and compensatory damages, Taylor v. Sandoval, 442 F.Supp. 491, 496 (D. Colo. 1977).

Defendant calls my attention to several facts to be considered in determining the amount of punitive damages which reasonably could be awarded to plaintiff. Defendant first argues that evidence demonstrating its evil intent or reckless disregard for the feelings of plaintiff is minimal to nonexistent. Second, assuming that I will reduce to some substantial degree the compensatory damage award for pain and suffering, defendant notes that the punitive damage award should be reduced proportionately. Finally, defendant notes that plaintiff only sought punitive damages in the amount equivalent to the

compensatory damages requested in his complaint; even if the compensatory damage award is not reduced, this ratio suggests that punitive damages should not exceed the amount of compensatory damages awarded.

In conclusion, defendant asserts that such an excessive award of punitive damages demonstrates that the jury acted out of prejudice, passion and sympathy for the plaintiff. Defendant thus requests a new trial absent the acceptance of a substantial remittitur of the punitive damages.

In the majority of cases, the discussion of remittitur relates only to punitive damages. Several cases, however, address the issue of remittitur of actual damages. In K-B Trucking Co. v. Riss International Corporation, 763

F.2d 1148 (10th Cir. 1985), the jury had awarded plaintiffs actual and punitive damages on their fraudulent misrepresentation claims against two defendants. The Court of Appeals found sufficient evidence to support the jury's findings of liability against both defendants, as well as sufficient evidence to support the actual damage award against one of the defendants; there was insufficient evidence to support an actual damage award against the second defendant, however. The court, therefore, stated that remittitur would be appropriate under the circumstances. The court was guided by the "abuse of discretion" standard enuciated in Garrick v. City and County of Denver, 652, F.2d 969, 971 (10th Cir. 1981) which stated:

> Under federal law, whether the trial court properly refused to grant remittitur or a new trial on the ground of an excessive damage award is tested by an abuse of discretion.

In Garrick the court found that the trial court had abused its discretion in light of the insufficiency of the evidence to support the actual damage award against the second defendant. The trial court thus should have ordered remittitur and alternatively, directed a new trial if the defendant refused to accept the remittitur.

Blevins v. Cessna Aircraft Co., 728 F.2d 1576 (10th Cir. 1984) involved a product liability action against an airplane manufacturer in which the plaintiff sought damages for injuries during an emergency off-field landing after the plane developed engine trouble.

After consideration of plaintiff's injuries as detailed in the record and the evidence concerning the extreme pain he endured, the court could not say that the jury's award of $1.3 million (of the $2 million verdict) for pain, suffering, and disability "shocks the judicial conscience." The court also refused to find reversible error based on defendant's argument that plaintiff's counsel made improper "Golden Rule" remarks (remarks encouraging the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.) The court conceded that plaintiff's counsel made a few improper remarks, appealing for sympathy and some prejudice, but in considering the remarks and arguments as a whole, and noting the

lack of any timely objection, the court found no reversible error. The court concluded that "the $2 million jury award, while very substantial, was not so excessive as to require reversal or remittitur in light of the record as to all the items of damages." Id. at 1582.

In Hurd v. American Hoist and Derrick Co., 734 F.2d 495 (10th Cir. 1984), a successful products liability action was brought against a manufacturer of an oil field safety block, and the district court denied a subsequent motion for a new trial and for remittitur. The defendant appealed, challenging the award of over $60,000 for "severe and permanent injuries, great pain of body and mind and permanent disability." Id. at 502. In rejecting defendant's claim, the court held:

> In light of the evidence of serious injury and pain and suffering, we are not persuaded that the damage award was excessive or unsupported by the evidence. '[A]bsent an award so excessive or inadequate as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the fact is considered inviolate.' Id. at 503, quoting Garrick v. City and County of Denver, 652 F.2d 969, 971-72 (10th Cir. 1981) which quotes Barnes v. Smith, 305 F.2d 226, 228 (10th Cir. 1962).
>
> Under our standard, we conclude that here the award was not so plainly excessive that we should infer that it was the result of passion or prejudice, and we cannot hold the award is shocking to the conscience of the court; therefore we should not order a remittitur. Id.

Colorado courts and the Tenth Circuit in Malandris and in other decisions, have consistently held that

while bias, prejudice or passion can be inferred from an excessive damage award, a verdict will not be set aside unless it is plainly excessive so as to suggest that it was the product of such passion or prejudice on the part of the jury. Blevins v. Cessna Aircraft Co., 728 F.2d 1576 (10th Cir. 1984); Garrick v. City and County of Denver, 652 F.2d 969, 971-72 (10th Cir. 1981); Hurd v. American Hoist and Derrick Co., 734 F.2d 495 (10th Cir. 1984); Leo Payne Pontiac, Inc. v. Ratliff, 20 Colo. App. 386, 486 P.2d 477 (1971), rev'd on other grounds, 178 Colo. 361, 497 P.2d 997 (1972).

In Burns v. McGraw-Hill Broadcasting Company, Inc., 659 P.2d 1351 (Colo. 1983), the Supreme Court of Colorado held that in a defamation case, it would not set aside the jury's determination of

damages unless they are "so outrageous as to strike everyone with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted with prejudice, partiality or corruption." Id., at 1356 (quoting Riss & Co. v. Anderson, 108 Colo. 78, 85, 114 P.2d 278, 281 (1941)). The Riss opinion, authored by Mr. Justice Young, in turn quotes heavily from Colorado Springs & Interurban R.R. Co. v. Kelly, 65 Colo. 246, 176 Pac. 307:

> As relates to the contention of excessive damage, we must bear in mind and be governed by the rule laid down by Chancellor Kent more than a century since, and generally adhered to by all courts, and by this court; that it is exclusively the province of the jury to estimate and assess the damages, and that the amount to be allowed in such cases rests largely in their sound discretion. He said:

> The question of damages was within the proper and peculiar provices of the jury. It rested in their sound discretion, under all the circumstances of the case, and unless the damages are so outrageous as to strike everyone with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from prejudice, partiality or corruption, we cannot, consistently with the precedents, interfere with the verdict. It is not enough to say, that in the opinion of the court, the damages are too high, and that we would have given much less. It is the judgment of the jury and not the judgment of the court, which is to assess the damages in actions for personal torts and injuries.

And as was well said by Justice Story in Thurston v. Martin, 5 Mason 497, Fed Cas. No. 14018:

> It is one thing for a court to administer its own measure of damages in a case properly before it, and quite another thing to set

> aside the verdict of a jury because it exceeds that measure.

Palmer v. A.H. Robins Co., Inc., 684 P.2d 187 (Colo. 1984) involved a products liability action to recover compensatory and punitive damages from a manufacturer of an intrauterine device. In its discussion of punitive damages, the court noted that such damages do not admit of precise determination; thus, the amount of the award must necessarily rest, in the first instance, within the discretion of the fact finder. Id. at 220. While there is no precise formula to determine the relationship between punitive and actual damages, there is a need for judicial scrutiny to ensure that the jury is not impermissibly motivated by prejudice or not properly guided by the

purposes for punitive damages. The court noted that

> [a]lthough a ten-to-one ratio of punitive to compensatory damages warrants close judicial scrutiny, we note that high ratios have been upheld where the record shows that the jury was properly guided by the purposes of a punitive damages award in reaching its verdict. See, e.g., Mailloux v. Bradley, 643 P.2d 797 (Colo. App. 1982) (rations of 10:1 and 35:1 upheld); see also, e.g. Vossler v. Richards Mfg. Co., Inc., 143 Cal. App. 3d 952, 192 Cal. Rptr. 219 (1983) (20:1 ratio upheld); Ettus v. Orkin Exterminating Co., Inc., 233 Kan. 555, 665 P.2d 730 (1983) (24:1 ratio upheld) . . . Id. at 220.

In Palmer, supra, the court saw no reason to view the jury's verdict

> as other than the conscientious decision of a jury to punish a wrongdoer with a penalty commensurate with the seriousness of the misconduct and the financial ability of the offender to pay and, concomitantly, to deter [the

> defendant] and others from similar acts of misconduct in the future. Id. at 221.

Several Coloardo appellate court cases address this same issue. In Martin v. Bralliar, 36 Colo. App. 254, 540 P.2d 1118, 1122 (1975), a medical malpractice action, the court stated that the "assessment of damages is the exclusive province of the jury, and it is only in the clearest cases that its award will be overturned on review." In Good v. A.B. Chance Co., 39 Colo. App. 70, 565 P.2d 217 (1977), a wrongful death action against the manufacturer and retailer of an aerial boom device, the jury award exceeded by $44,000 the amount of pecuniary loss projected by the plaintiff's economist. The court did not find the jury's award to be grossly excessive since the expert had conceded

his figures were conservative and the jury was not required to adhere strictly to the expert testimony. Id. at 226.

An A.L.R. annotation addresses the recovery of damages for emotional distress in cases of discrimination based on sex and marital status. Annot., 61 A.L.R. 3d 944 (1975). The annotation notes:

> By way of background, it should be noted that the courts in most jurisdictions where the question has arisen have in the appropriate circumstances permitted recovery of damages for emotional distress resulting from a variety of forms of discrimination. Id. at 945.

Normally, under common law principles, courts have required a showing of outrageous conduct in order to obtain such recovery. Courts have relaxed this standard, however, where a

special relationship was shown between the parties--i.e., employer-employee, "apparently upon the theory that it would be tantamount to extortion to permit a defendant who wields actual or apparent power over the plaintiff to abuse his position." Id. at 945.

It is to be remembered that this is a case involving the law of Colorado. It is not related in any way to the federal Age Discriminiation in Employment Act nor to the congressional history of that Act nor to policies and decisions of federal courts interpreting that Act. Here, the plaintiff filed his case in a state court pursuant to a state statute. The case was removed to the federal court by the defendant. Nevertheless, Colorado law governs.

Indeed, the plaintiff's choices of law and forum set upon him a much higher burden. Under the Colorado statute age discrimination must be shown to be the sole and only reason for termination. Having met that burden, a plaintiff is entitled under Colorado law to recover unliquidated as well as liquidated damages. If plaintiff proves his claim for relief, he may also recover exemplary damages if he can prove beyond a reasonable doubt that the wrong done to him was attended by circumstances of fraud, malice or insult, or a wanton and reckless disregard of his rights and feelings.

I have written three opinions in this case, listened to the evidence in two separate trials before two distinct juries. I find no evidence to suggest

that the verdict returned in either trial was the product of passion, prejudice or misconduct. Nor do I find that the verdict on the damages trial was contrary to the evidence. It is obvious that the jury considered the evidence and, in its wisdom, rejected the defendant's evidence. Issues of credibility are supposed to be resolved by a jury as the finders of fact. Indeed, it is probable that this jury rejected defendant's evidence because the members of the jury found it was pretextual.

Certainly, evidence was presented which, if believed, would have supported a defense verdict. In equal measure, evidence was presented, and apparently believed, that justified verdicts on actual as well as exemplary damages.

At the time of his firing the plaintiff was almost sixty years old. From completion of his military service in World War II until his termination he devoted his entire working life to the defendant's business. For thirty-three years his performance was never below satisfactory, was frequently superior and, in some instances, was recognized as excellent. His performance was repeatedly and systematically evaluated. There was ample evidence from which the jury could conclude that the plaintiff was a loyal, dedicated and productive employee.

There was substantial evidence from which the jury could find that the plaintiff was discharged in a callous and demeaning manner; that the method of investigation and termination was

insulting and utterly disregarded plaintiff's rights and feelings; and that the plaintiff was discharged in pursuit of a company-wide plan to reduce the number of older employees in order to make room for promotions of younger employees. The evidence clearly showed that the defendant reaped large financial gains from employee cutbacks.

The question of whether the damages awarded are so excessive as to require a vacation of the verdict or remittitur remains to be addressed. Plaintiff's actual damages are clearly supported by evidence in the record. Both economists testified that they were using conservative estimates. The jury was not bound to those estimates. It was within the jury's province to determine the plaintiff's probable retirement date, his

predictable pay increases based on earnings history and the appropriate amount to discount to present value. Plaintiff's Exhibit 498 more than amply provides the basis for the jury's determinations.

It is not for me to say that a jury's assessment of unliquidated damages is wrong because I would have arrived at a different figure. Indeed, the constant exposure to death, injury and outrage which confronts judges necessarily jades our vision and immures our emotions. The genius of the jury system is the deliverance of judgment by collective response from members of the community who have ordinary experience.

In its argument the defendant compares the damages awarded by the jury for pain, suffering and humiliation to

sums awarded in physical injury cases involving quadraplegia. The comparison is inapposite for a whole host of reasons, not the least of which is the presence in such cases of other sources of compensation and treatment.

The injuries suffered by the plaintiff in this case are more akin to those suffered in defamation cases. Indeed, the plaintiff's reputation in his community was destroyed by the acts of defendant. The plaintiff was totally disgraced to the extent that he contemplated suicide. Large awards in similar circumstances have been awarded.

This case was tried to a jury of six persons. One was a retired college professor, another was a registered professional pharmacist; others were college educated. The members of this

jury sat together, consulted with one another and applied their separate experiences in the affairs of life to the facts adduced at trial. There is not even the breath of a suggestion that this jury based its verdict on anything other than the evidence offered at trial. From this trial these six jurors drew a unanimous conclusion which it is the very function of the law to obtain. As Justice Hunt said so well in Sioux City & P. Ry. Co. v. Stout., 84 U.S. 657, 664, 17 Wall. 657, 21 L.Ed. 745 (1874), "It is assumed that twelve men know more of the common affairs of life than does one man: that they can draw wiser and safer conclusions from admitted facts thus occuring than can a single judge."

In sum, I think it would be the worst sort of judicial activism to vacate

this verdict merely because I might have reached a different result or because the lawyers made different evaluations. The punitive damage award is less than twice the actual damage award; well within the range of reasonableness surveyed by the Tenth Circuit in Malandris v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 703 F.2d 1152 (1981).

I am simply not imperious enough to say that this jury did not know what it was doing or that passion, prejudice or corruption or other improper cause invaded the trial. On the basis of conflicting and sometimes unexplained evidence, this jury found in favor of an individual and against a vast corporate enterprise. Its award of exemplary damages bears a reasonable relationship to the actual damages which it found and

yet is large enough to fulfill the purpose of exemplary damages as stated in the instructions of law delivered to it. Based on the evidence I heard, my judicial conscience is not shocked--though my acquired cynicism has received a rather sharp blow.

For these reasons, defendant's post-trial motions are denied. An amended judgment shall enter this day in the total sum of $19,096,495.01. A stay of execution on the judgment is granted until September 13, 1985. Bond on appeal is set at $24,000,000.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-K-1454

GARY RAWSON, Plaintiff,

v.

SEARS, ROEBUCK AND CO., Defendant.

JUDGMENT

Pursuant to and in accordance with the Order entered by the United States Court of Appeals for the Tenth Circuit on June 10, 1987, it is hereby

ORDERED that judgment is entered for the defendant Sears, Roebuck and Co. and against the plaintiff Gary Rawson; that the party is to pay his or its own costs.

Dated at Denver, Colorado, this 13th day of October, 1987.

BY THE COURT:
John L. Kane, Jr.
U.S. District Judge

CONSTITUTION OF THE UNITED STATES

Article V

Grand jury - indictment - jeopardy - process of law - taking property for public use.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

CONSTITUTION OF THE UNITED STATES

Article X

Reserved Powers. The powers not delegated to the United States by the consitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Article XIV

Section 1. Citizenship defined - privileges of citizens.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor

deny to any person within its jurisdiction the equal protection of the laws.

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28 U.S.C. section 1254

Cases in the courts of appeals may be reviewed by the following methods:

(1) By writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

COLORADO APPELLATE RULES

Rule 21.1. Certification of Questions of Law

(a) Power to Answer. The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court, or United States Court of Claims, when requested by the certifying court, if there is involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court. (Amended and effective Jun 24, 1976.)

(b) Method of Invoking. This Rule

may be invoked by an order of any of the courts referred to in section (a) upon said court's own motion or upon the motion of any party to the cause.

(c) Contents of Certification Order. A certification order shall set forth:

(1) The question of law to be answered; and

(2) A statement of all facts relevant to the questions certified and showing fully the nature of controversy in which the questions arose.

(d) Preparation of Certification Order. The certification order shall be prepared by the certify court, signed by the judge presiding at the hearing, and forwarded to the Supreme Court by the clerk of the certifying court under its official seal. The Supreme Court may require the original or copies of all or

of any portion of the record before the certifying court to be filed under the certification order, if, in the opinion of the Supreme Court, the record or portion thereof may be necessary in answering the questions.

(e) Costs of Certification. Fees and costs shall be equally dividied between the parties unless otherwise ordered by the certifying court in its order of certification.

(f) Briefs and Agrument. Upon the agreement of the Supreme Court to answer the questions certified to it, notice shall be given to all parties. The plaintiff in the trial court, or the appealing party in the appellate court shall file his opening brief within thirty days from the date of receipt of the notice, and the opposing parties

shall file an answer brief within thirty days from service upon him of copies of the opening brief. A reply brief may be filed within twenty days of the service of the answer brief. Briefs shall be in the manner and for of briefs as provided in C.A.R. 28. Oral arguments shall be as provided in C.A.R. 34.

(g) Opinion. The written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties.

(3)

No. 87-681

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

GARY RAWSON,
Petitioner,

VS.

SEARS, ROEBUCK AND COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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OCTOBER TERM, 1987

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Defendant-respondent Sears, Roebuck and Co. ("Sears")[1] opposes the petition for writ of certiorari filed by plaintiff-petitioner Gary Rawson ("Rawson"). Jurisdiction in the trial court was grounded in diversity of citizenship and the sole issue decided by the Tenth Circuit Court of Appeals was a matter of state law. Neither a federal question nor any other significant legal issue is presented in the petition.

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[1]A listing of Sears' corporate affiliations and subsidiaries, other than wholly-owned subsidiaries, is attached as an appendix to this brief, in compliance with Supreme Court Rule 28.1.

STATEMENT OF THE CASE

In his petition, Rawson sets forth a "Statement of the Case" which purports to relate the facts and procedural history of the instant matter. Sears respectfully submits the following statement of the case, which describes the seminal history of this matter devoid of Rawson's emotional diatribe, his misstatement of the record and his unsupported and unsupportable statements of "fact."

Rawson, a former Sears employee and store manager who was terminated at age 59, filed this action in July 1981 in Colorado state court. (A. 2a-3a.)[2] Sears removed the case to the trial court, where all but one of Rawson's eleven claims were dismissed. (A. 3a-4a.) Rawson never appealed the dismissal of his claims but relied instead on his single remaining claim for damages for age discrimination in employment under Colorado Revised Statutes ("C.R.S.") § 8-2-116. Notwithstanding that the sole remedy for violation of C.R.S. § 8-2-116 is a penal fine (see C.R.S. § 8-2-117), and absent any showing of legislative intent to provide a civil remedy thereunder, the trial court nonetheless determined that Rawson could pursue a private civil action for age discrimination under that statutory provision. (A. 116a.) Until the trial court's decision in this case, no Colorado court, nor any federal court applying Colorado law, had determined that the Colorado legislature intended to create a private right of action for age discrimination based on C.R.S. § 8-2-116, and in fact, since the statute's enactment in 1903, no reported decision had even mentioned the provision. (A. 5a.)

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[2]"A. 2a-3a" refers to pages 2a-3a of the record set forth in the appendix filed concurrently with the petition for writ of certiorari. Similar references will be used throughout this brief.

Trial was bifurcated in this action. The jury returned a verdict against Sears as to liability on January 30, 1984. (A. 175a.) The trial court denied Sears' motions for Judgment Notwithstanding the Verdict and for New Trial and awarded Rawson costs in the amount of $11,096.54. (A. 8a, 152a-171a.) Sears filed a timely cost appeal.

On July 19, 1985, a second jury assessed compensatory damages of approximately $844,910 for lost wages and benefits, $5,000,000 for pain and suffering and $10,000,000 in punitive damages. (A. 175a-176a.) The trial court denied Sears' post-trial motions in which Sears contended that the evidence did not support punitive damages and that both the compensatory and punitive damages awards were excessive and unreasonable. (A. 172a-209a.) The trial court awarded Rawson prejudgment interest in the amount of $3,251,585.01, awarded post judgment interest, and entered judgment in the amount of $19,096,495.01 on August 28, 1985. (A. 8a, 209a.) Sears filed a timely notice of appeal.

Recognizing that conflict arose in both the federal district courts and state trial courts in Colorado after the initial *Rawson* decision, the Tenth Circuit conducted an "independent inquiry" into the proper interpretation of state law and determined that there was neither an express nor implied private right of action for violation of C.R.S. § 8-2-116. (A. 1a-69a.) Rawson's request for rehearing and rehearing en banc was denied by the Tenth Circuit. (A. 102a-103a.)

SUMMARY OF ARGUMENT

This case presents no issue which would warrant granting the petition for writ of certiorari. Jurisdiction in the district court was based on diversity of citizenship and the only issue decided by the Tenth Circuit was a matter

of state law — whether a 1903 Colorado statute prohibiting age discrimination in employment, which set forth only criminal penalties and which has been repealed, provided a private right of action for age discrimination for Rawson. The Tenth Circuit Court of Appeals resolved the conflict among the federal district courts and state trial courts in Colorado by finding that the Colorado legislature intended no private right of action for age discrimination in employment. That decision reversed the trial court's judgment and jury award against Sears. The Tenth Circuit's ruling was based on long-standing and unequivocal Colorado case authority, analogous authority from other jurisdictions and recognized canons of statutory construction which had been ignored by the trial court. It was soundly reasoned and provides no basis for scrutiny by this Court.

REASONS FOR DENYING THE PETITION

Despite Rawson's attempt to raise new issues on appeal (his alleged "absolute" right to recover for any alleged injury under the Colorado constitution), this case is a straightforward matter involving the interpretation of Colorado criminal statutes enacted in 1903, proscribing age discrimination in employment and establishing a $250 maximum misdemeanor penalty. C.R.S. §§ 8-2-116 and 117. This Court has repeatedly expressed its reluctance to interfere in the interpretation of local laws (*see, e.g., Butner v. United States,* 440 U.S. 48 (1979); *Bishop v. Wood,* 426 U.S. 341 (1976)), and this case provides no justification for doing so.

Supreme Court Rule 17 sets forth a detailed list of reasons for granting review on writ of certiorari. Although the grounds set forth in Rule 17 are not an exhaustive measure of the Court's discretion to grant

review, review is granted "only when there are special and important reasons therefor." Such significance may attach when a federal court of appeals has rendered a decision in conflict with another federal court of appeals. when a federal court of appeals has decided a federal question in conflict with a state court of last resort, when a federal court of appeals has markedly departed from accepted judicial practice, when a state court of last resort has decided a federal question in a manner which conflicts with the decision of another state court of last resort or a federal court of appeals, or when a state or federal court of appeals has decided an important question of federal law which should be settled by this Court or which is in conflict with pertinent decisions of this Court. *See* Supreme Court Rule 17.1(a)-(c).

None of the enumerated reasons for granting review obtains in this case, nor are there any other "special and important reasons" for granting review on writ of certiorari. Rawson's petition certainly presents no federal question, nor is the Tenth Circuit's decision in conflict with the decision of any other federal court of appeals or state court of last resort. Jurisdiction in the district court was based on diversity of citizenship and Rawson's claim at trial was based on a state statute — C.R.S. § 8-2-116. The Tenth Circuit's decision turns entirely on the interpretation of that state statute, based on Colorado case authority, analogous authority from other jurisdictions, and canons of statutory construction.

Rawson's belated attempt to invoke the Colorado constitution in his petition likewise raises no issue of federal law. And Rawson's assertion that the Colorado constitution "guarantees" a remedy for any injury is sheer nonsense. The Colorado Supreme Court has itself precluded recovery under a statute where, as here, the Colorado

legislature has prescribed remedies for violation of the statute or the statute recognizes rights or duties in derogation of the common law. *See, e.g., Continental Title Co. v. District Court,* 645 P.2d 1310 (Colo. 1982) (no recovery for handicap discrimination outside of remedies specified in Colorado's Antidiscrimination Act); *Board of County Comm'rs v. Pfeifer,* 190 Colo. 275, 546 P.2d 946 (1976) (statute granting Board of County Commissioners equitable powers to enjoin sale of land before final plat approval does not include power to set aside conveyance of land); *Quintano v. Industrial Comm'n,* 178 Colo. 131, 136, 495 P.2d 1137, 1139 (1972) (injured worker could not maintain private damages action against Colorado Industrial Commission for violation of statute charging Commission with workplace safety inspection). *See also Holter v. Moore,* 681 P.2d 962 (Colo. Ct. App. 1983) (no private action for violation of real estate licensing provision when legislature limited remedies to discipline and criminal fines); *Silverstein v. Sisters of Charity,* 38 Colo. App. 286, 559 P.2d 716 (1976) (remedy for handicap discrimination limited to criminal penalties specified in statute). The Colorado constitution simply guarantees equal access to the courts for *cognizable* wrongs, and Rawson has no cognizable claim.

Rawson repeatedly asserts that the Tenth Circuit deprived him of his "common law rights" which the trial court purportedly recognized. In passing, Rawson then urges that the Tenth Circuit thereby violated the Fifth Amendment of the United States Constitution. The argument is specious. First, the trial court did not create or recognize a common law right of action for age discrimination; in fact, it dismissed Rawson's common law claims. (A. 136a, 151a.) According to repeated rulings by the trial court, a private right of action for age discrimination was *implied* in C.R.S. § 8-2-116. (A. 108a-116a, 173a.)

Rawson has raised the issue of a "common law" age discrimination claim for the first time in his petition. Second, it is well established that the duty not to discharge an employee because of age is purely a creature of statute and is in *derogation* of the common law. *See, e.g., Strauss v. A.L. Randall Co.,* 144 Cal. App. 3d 514, 520, 194 Cal. Rptr. 520, 524 (1983); *accord Fawcett v. G.C. Murphy & Co.,* 46 Ohio 2d 245, 348 N.E.2d 144 (1976); *Johnson v. United States Steel Corp.,* 348 Mass. 168, 202 N.E.2d 816 (1964) (superseded by statute). Third, if, as Rawson seems to suggest, reversal of a damage award on appeal is an unconstitutional taking of property in violation of the Fifth Amendment, appellate review would become meaningless. Rawson ignores the simple fact that he has been accorded "due process of law" throughout several years of litigation and appeal.

Moreover, the Tenth Circuit's decision was sound. The Tenth Circuit's ruling was based on long-standing Colorado case authority in which both the Colorado Supreme Court and state appellate courts have refused to expand remedies prescribed by statute when the statute establishes rights or duties unknown at common law and specifies remedies for its violation. *See, e.g., Silverstein v. Sisters of Charity,* 38 Colo. App. 286, 559 P.2d 716 (1976) (anti-handicap discrimination statute established rights and duties unknown at common law; remedies limited to those specified in statute); *accord Agnello v. Adolph Coors Co.,* 695 P.2d 311 (Colo. App. 1984). The statute in question, C.R.S. § 8-2-116, provided rights unknown at common law and specified criminal penalties for its violation, thereby making it clear to the Tenth Circuit that the Colorado Supreme Court would find neither an express nor an implied cause of action under the statute. The Tenth Circuit also based its decision on established principles of statutory construction finding that C.R.S. §§ 8-3-

108, and 8-3-121, which together permit recovery for damages for the commission of a crime or misdemeanor in disputes over employment relations, and on which the trial court relied, have no applicability outside of the management/union context.

Rawson has suggested, mistakenly, that Supreme Court precedent requires federal courts of appeals to adopt the "local judge rule," and defer to the trial court's interpretation of state law. None of Rawson's cited cases suggest that this Court has mandated such deference by federal courts of appeals. On the contrary, this Court has recognized that federal appellate review of a trial court's interpretation of state law is not a *pro forma* exercise. *See Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 209 (1956) (Frankfurter, J., concurring).

Moreover, as the majority in the Tenth Circuit decision took pains to point out, the Tenth Circuit did not "abandon" the local judge rule. The majority adhered to a recognized exception to that rule, triggered when other federal district court judges sitting in the same state disagree with the ruling in question.[3] This is neither a departure from Tenth Circuit practice (*see, e.g., Maughan v. SW Servicing, Inc.*, 758 F.2d 1381, 1384 n.2 (10th Cir. 1985); *McGehee v. Farmers Ins. Co.*, 734 F.2d 1422, 1424-25 (10th Cir. 1984)), nor a departure from other circuit courts' practices. *See, e.g., Big River Grain, Inc. v. SBA*, 718 F.2d 968 (9th Cir. 1983); *Luke v. American Family Mutual Ins. Co.*, 476 F.2d 1015 (8th Cir. 1972), *cert.*

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[3]As the Tenth Circuit noted, since the initial *Rawson* decision, federal district courts in Colorado and state trial courts have divided on the issue of whether an express or implied private right of action is contained in C.R.S. § 8-2-116. (A. 10a-11a, 30a-33a.) Thus, the Tenth Circuit properly concluded that this case is a "wholly inappropriate vehicle for testing the 'local judge' rule." (A. 15a.)

denied, 414 U.S. 856 (1973). Nor did Rawson persuade the entire Tenth Circuit that the panel had departed from an established "rule": the entire circuit denied Rawson's request for rehearing en banc. (A. 102a-103a.)

Rawson's request that this Court certify the issue to the Colorado Supreme Court is an unseemly attempt to forum shop and a transparent effort to get another "bite at the apple." Rawson fails to note that he adamantly opposed certification when Sears requested it before the trial court in 1983. The trial court denied Sears' request for certification. Rawson continued to oppose certification when the Tenth Circuit requested that the parties brief the issue of certification on appeal.[4] (A. 6a n.4.) In its discretion, the Tenth Circuit did not certify the question to the Colorado Supreme Court: the Tenth Circuit noted in its decision that "there is adequate authority from Colorado state courts to guide our deliberations in this case." (A. 14a n.6.) Unhappy with the Tenth Circuit's resolution of the state law issue, Rawson now wants to relitigate this matter in a forum he twice argued should be foreclosed to the parties. Rawson's eleventh hour about-face has come after more than six years of litigation, and this Court should reject his request that the Court override both the trial court's and court of appeals' respective decisions to decide the state law question rather than certify it to the state supreme court. The trial court and court of appeals accepted their rightful responsibility in a diversity action to decide issues of state law, and their exercise of discretion should be respected. *Cf. Meredith v. Winter Haven,*

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[4]Sears also opposed certification on appeal because lengthy litigation had already transpired, certification would entail further delay and Sears had raised numerous other non-certifiable issues in the appeal.

320 U.S. 228 (1943) (federal courts have duty to decide questions of state law in diversity cases).

Finally, the Colorado statute in question has little significance beyond the instant case. The Colorado legislature has effectively settled the issue for all future cases by its repeal of C.R.S. § 8-2-116, and its inclusion of age discrimination in Colorado's Antidiscrimination Act, C.R.S. §§ 24-34-301 *et seq.* (A. 5a-6a.) The Colorado Supreme Court has made it clear that remedies under the Antidiscrimination Act are prescribed by statute and no civil remedies, outside of those afforded by the Act, may be implied. *Continental Title Co. v. District Court,* 645 P.2d 1310 (Colo. 1982). Thus, only a handful of cases could be affected by this Court's review of the Tenth Circuit's decision.

CONCLUSION

Rawson has raised no federal question in his petition nor any other "special and important" reason to justify granting review of the Tenth Circuit's decision in this case. Accordingly, the petition should be denied.

Dated: November 20, 1987.

Respectfully submitted,

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APPENDIX

RULE 28.1 STATEMENT

Sears, Roebuck and Co.'s subsidiaries and affiliates, other than wholly-owned subsidiaries and affiliates, are as follows:

Allstate Automobile & Fire Insurance Company Limited	(Japan)
Allstate Insurance Company of Canada	(Canada)
Allstate Life Insurance Company of Canada	(Canada)
Allstate Service Stations Limited	(Canada)
American Rehab Products Inc.	(U.S.A.)
Angrignon	(Canada)
BOWO, S.A.	(Costa Rica)
Burkhart — AS 1983 Limited Partnership	(U.S.A.)
Carrefour Richelieu Realties Limited	(Canada)
Chatham Centre Mall Limited	(Canada)
Citrus Park Venture	(U.S.A.)
Clearview Mall Company	(U.S.A.)
Colony Gas Gathering — A Ltd. Partnership	(U.S.A.)
Contill Realty Limited	(Canada)
Cranberry Mall Company	(U.S.A.)
Dean Witter Futures Limited	(U.K.)
Dean Witter Reynolds International S.A.	(France)
Dean Witter Reynolds (Lausanne) S.A.	(Switzerland)
Dean Witter Reynolds Limited	(U.K.)
Dean Witter Reynolds S.A.	(Switzerland)
Dean Witter Reynolds S.p.A	(Italy)
Fallowfield Developers, Ltd.	(U.S.A.)
Fiesta Mall Venture	(U.S.A.)

492398 Ontario Limited	(Canada)
Gas Resources, Ltd., A Partnership in Commendam	(U.S.A.)
H-D Lakeland Mall J.V.	(U.S.A.)
HDXR Associates	(U.S.A.)
H-L Land Improvement Venture	(U.S.A.)
H-L Mall Venture	(U.S.A.)
H-L Office Venture	(U.S.A.)
Kelfor Holdings Limited	(Canada)
Kerrybrooke Developments Ltd.	(Canada)
Kerrytor Limited	(Canada)
Kingsway Imports Ltd.	(Canada)
Lake Hodges Development Co.	(U.S.A.)
Lakepointe Joint Venture	(U.S.A.)
Lakeside/Nov. Associates	(U.S.A.)
Landcaster Mall Associates	(U.S.A.)
Les Estimations Gilles Bordeleau Inc.	(Canada)
Mercer Mall Company	(U.S.A.)
Montorlab Inc.	(Canada)
New Park Associates	(U.S.A.)
North 400 Venture	(U.S.A.)
134245 Canada Ltd.	(Canada)
Quetor Realty Ltd.	(Canada)
Regbrooke Limited	(Canada)
Regional Shopping Centres Limited	(Canada)
Regional Shopping Centres (Canada) Limited	(Canada)
Ridgwell, Fox and Partners (Underwriting Management) Limited	(U.K.)
Sanguine/A Anadarko, Ltd.	(U.S.A.)
Sears Acceptance Company Inc.	(Canada)
Sears Canada Inc.	(Canada)
Sears First Chicago Trading Company	(U.S.A.)
Sears Holdings Limited	(Canada)

Sears Limited	(Canada)
Sears (1978) Limited	(Canada)
Sears Properties Inc.	(Canada)
Sears, Roebuck de Mexico, S.A. de C.V.	(Mexico)
Sears, Roebuck Pty. Limited	(Australia)
Sears, Roebuck Servicios de Chile Limitada	(Chile)
Sears, Roebuck S.A. Commercial e Industrial	(Argentina)
Sears-SGV Services Limited	(Philippines)
Sears World Trade Commercial Ltda.	(Brazil)
Seibu Allstate Life Insurance Company, Ltd.	(Japan)
S.L.H. Transport Inc.	(Canada)
St. Laurent Shopping Centre Ltd.	(Canada)
Simon Homart San Antonio Partnership	(U.S.A.)
Tempo-GP, Inc.	(U.S.A.)
The Mall at Buckland Hills Partnership	(U.S.A.)
The Woodlands Mall Associates	(U.S.A.)
Traflow Shipping Services Ltd.	(U.K.)
212552 Ontario Limited	(Canada)
Vantor Realty Ltd.	(Canada)
Westgate Associates	(U.S.A.)
Wintor Realty Ltd.	(Canada)
Woodfield Associates	(U.S.A.)
Xerox Centre Associates	(U.S.A.)

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On November 20, 1987, I served the within Brief in Opposition in re: "Gary Rawson vs. Sears, Roebuck and Company" in the United States Supreme Court, October Term 1987, No. 87-681; on the parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

James A. Carleo
620 S. Cascade, Suite 102
Colorado Springs, Colorado 80903

Thomas M. DeNiro
620 S. Cascade, Suite 102
Colorado Springs, Colorado 80903

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November 20, 1987, at Los Angeles, California.

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